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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1155~~ 112

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now George Levine, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court denying rehearing entered on the 9th day of April, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (1) .(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of March, 1965, (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

QUESTIONS PRESENTED

I

Whether or not the trial court committed reversible error in denying appellants' motion to disqualify the juror Mrs. Lewis for cause and for denying appellants' motion to grant additional peremptory challenges.

II

Whether or not the trial court committed reversible error in its charge to the jury wherein the trial court stated as follows: "The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on their trial . . . and unless they answer they should be convicted."

III

Whether or not the trial court and Circuit Court of Appeals for the Fifth Circuit committed reversible error in failing to dismiss and set aside all substantive counts pertaining to the appellant George Levine alleged to have

been committed prior to July 22, 1960, the date that the Government alleges in its indictment that the appellant George Levine entered into the scheme.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; Title 15 United States Code Annotated, Section 77q(a); Title 18 United States Code Annotated, Section 1341; Title 18 United States Code Annotated, Section 371; Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Text of the same are set forth in Appendix I hereof.

STATEMENT OF THE CASE

Your petitioner George Levine was accused jointly with ten other co-defendants of violating the anti-fraud provisions of the Securities Act of 1933. The indictment contained five counts setting forth violations of Title 15 U.S.C. 77q(a), four counts setting forth violations of Title 18 U.S.C. 1341, and one count of conspiracy to violate the corporate security and mail fraud laws in violation of Title 18 U.S.C. 371.

The indictment further charges your petitioner George Levine gained control of the Credit Finance Corporation on July 22, 1960, and prior to that time he had nothing to do with this whole operation.

That thereafter a jury trial was had and evidence was presented to the jury, a more complete and thorough statement of the evidence presented to the jury is contained herein in Appendix D. Your petitioner was found guilty of ten counts and after adjudication of guilt, was sentenced to fifteen months imprisonment on each count consecutively or a total sentence of twelve and one-half years.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 11th day of March, 1965, and that thereafter a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your petitioner should be granted for the reason that the decision of the Fifth Circuit of *Sherwood v. United States*, 300 F. 2d 603, is in direct conflict with the order of the Fifth Circuit in the case at bar in denying petitioner's petition for rehearing without opinion (Appendix B., Appendix C.).

In support of this it is respectfully urged that in said petition for rehearing it was pointed out to the Fifth Circuit Court of Appeals that the court had in its opinion reversed the trial court because of the fact that three of the appellants, namely, Schiff, Roberts and Gibbons were not employed by the organization in question at the time of the commission of the substantive offenses and for that reason and for that reason alone the Fifth Circuit Court of Appeals set aside the sentences against the defendants Schiff on counts one, three, four, five, six and seven; against Gibbons, counts one, two, three, four, five, seven, eight and nine, and against Roberts on counts one, two, four, five, seven and nine. However, they allowed the conspiracy count to remain.

As to your petitioner Levine, they allowed all of the counts to stand although the evidence is clear that your petitioner George Levine did not join the organization

in question until July 22, 1960, as is set forth in the indictment herein and that seven of the substantive counts were allegedly committed prior to that date.

That it is apparent to your petitioner that the law applied with reference to said counts as described herein by the Fifth Circuit Court of Appeals was proper for the appellants Gibbons, Roberts and Schiff, but not for the appellant George Levine. Your petitioner is at a loss to see how the law can be applied to one and not equally to another. That the failure to apply the law as to him as was applied to the other defendants, Gibbons, Schiff and Roberts would be a denial of his rights under the Constitution of the United States.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A.) in deciding the points more fully raised in your petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix D.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

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Miami, Florida 33130
Attorneys for Petitioner

By .....

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this ..... day of May, 1965, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D. C.

NICHOLAS J. CAPUANO

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH COURT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

TUTTLE, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q) (a), and the Mail Fraud

Statute, 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be deal with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to

the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's' financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false,

their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel v. U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.
>
> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . and unless they answered they should be convicted.
>
> "And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez v. United States*, 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the courtroom and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous; it was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants

[1]This statute provides in part as follows: "Whenever on trial for a violation of this subsection, the defendant is shown to have had or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.
>
> "On the contrary, they were within their rights in not testifying in the case.
>
> "So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a

postal inspector for proper use by the United States. It is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The government expert, the accountant Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries. It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States v. Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d. 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill v. United States*, 5 Cir., 298 F. 2d. 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire*, this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand

[2]It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with the evidence in this case if he is on trial?" She answered, "I think so." Thereupon the court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire*, which we seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there no no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was designed to facilitate proof of business records seem to have been fully met here. The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll v. United States*, 9 Cir., 1963 326 F. 2d 72, and *Taylor v. United States*, 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not to be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well established that such books and records are admissible only against corporate offices with access and control thereof, who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records

do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company*, but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a participant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer par-

ticipation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused persons. See *Greenhill v. United States*, 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960,

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[3]Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two, four, five, seven and nine must be set side. Gibbons was an employee of the company for approximately two months—from the end of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood v. United States*, 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan v. United States*, 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten.

The sentences against Schiff on counts one, three, four, five, six and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

APRIL 9, 1965

Re:
No. 19974
NORMAN GRADSKY, ET AL
Versus
UNITED STATES OF AMERICA

Gentlemen:

You are hereby advised that the court has today entered an order denying the petitions for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
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COURT RULE

Rule 32

ISSUANCE OF MANDATE

Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

on behalf of

Appellant, GEORGE LEVINE

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PETITION FOR REHEARING

The Appellant, George Levine, respectfully petitions this Court for rehearing of the appeal herein on the following grounds:

The Appellant respectfully suggests that the United States Court of Appeals, Fifth Circuit, erred in its judgment in that it failed to consider several aspects of the Appellant's brief in support of Points I, II, IV and VI.

Points I and II of this Appellant's brief are concerned with the Voir Dire examination of the Juror, Mrs. Lewis, and the abuse of discretion of the Lower Court in not granting additional peremptory challenges. There is no question but that Mrs. Lewis specifically stated on Voir Dire examination that she would have to hear both sides, that she would expect the defendants to come forward with evidence. This Court passes this statement of the juror off by saying in its opinion that she did not know the rules of law as to which the trial court would later charge the jury. Surely this Court has enough experience to know that people who have such ideas in their minds cannot have them erased by an instruction of the court as to the law. This Honorable Court has at times made such statements in their opinions. That instructions cannot wipe out certain things and impressions.

The Court further went on to say in its opinion that there is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred. Certainly there is no indication here that she did understand fully the trial court's subsequent instructions at the close of all the evidence. In fact this Court in finding that

there was not sufficient evidence to convict three of the defendants on various substantive counts exhibits a lack of understanding of the law by all of the jurors including Mrs. Lewis. Surely the fact that Mrs. Lewis was of the mind that she would have to be convinced by hearing both sides, even if the court felt that the failure to grant more peremptory challenges was not an abuse of discretion, it was certainly a proper ground for a challenge for cause, which was made and denied.

Appellant further argues that Rule 24 (b). of the Federal Rules of Criminal Procedure giving the Court the right to grant more than ten peremptory challenges was promulgated for cases just as the one before this Court. There were ten defendants, ten counts. The atmosphere of the community was charged against these defendants, by news media of all kinds, as was shown by the length of time it took to get a jury, and from the number of challenges for cause that were sustained by the Court. Appellant urges that the trial court did abuse discretion by not granting more peremptory challenges.

As to Point III wherein the trial court in its charge to the jury stated,

> "The Grand Jury returned an indictment, and the Grand Jury of course, its thought was unless there was an answer to it. They should be put on their trial, and unless they answered they should be convicted."

This Court in its opinion passed over this abominable statement by the Court very lightly. Just because the trial court tried to cure its prejudical statement by saying it had no probative force and by other instruction does not excuse the giving of such a charge. How can this Court

say that such a statement was innocuous? Appellant feels that this Court is only making excuses for the trial court in its opinion. That this error is so serious that it would and should be a basis for reversing the whole case, which this Court was not inclined to do. This Court said in its opinion that the defendants did answer the indictment by pleading not guilty. Then why should the trial court who knew that the defendants had entered a plea of not guilty, go on to say:

"Unless there was an answer to it, they should be put on their trial, and unless they answered they should be convicted."

Certainly that charge, especially to a juror of the mental attitude of Mrs. Lewis, implied an obligation on the part of the defendants to take the witness stand and present evidence. The later subsequent charge attempting to correct such implication could not and would not erase such a statement from the minds of the jurors.

Suppose that the prosecuting attorney in his summation stated to the jury:

"That unless the defendants answered the indictment they should be convicted." Would this Court then say that such a statement or implication would be cured by the trial court charging the jury that the defendants need not take the stand and no inference could be drawn from the fact that they did not take the stand. I am sure that this Court would reverse upon the ground that the prosecutor cannot comment on the failure of the defendants to take the stand. That it would be a violation of their constitutional rights. Is it less a violation of their constitutional rights if the trial court makes such a statement? It is the Appellant's

view that the trial court cannot cure such a statement by a subsequent charge no more than he could cure such a statement by a prosecuting attorney by subsequent charges. It is the Appellant's view that the constitutional rights of all of the defendants were violated by the Court's charge as set forth in Point III of Appellant's brief.

As to Point VI, the Appellant is at a loss to understand the position of this Court. This Court in its opinion on page 12 stated:

> "We have carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts, their tenure with the company and thus their involvment in the fraudulent scheme was so short in the point of time and the number of representations actually made by them were so restricted that we conclude, since, too, they had no proprietory interest in the businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C."

Surely, this Court does not want to go on record to say that law as to one defendant is not law as to another. This Appellant, George Levine, by the government's own indictment, came into this organization on July 22, 1960, when he purchased the Security Guaranty Company. But not a single bit of evidence was introduced to show any connection between Levine and the Security Guarantee Company.

Seven of the substantive counts alleging a criminal offense were committed prior to July 22, 1960. The company ceased doing business on October 31, 1960, according to the government's witness, Callihan. In analysing this Court's opinion, Appellant points out that:

1. Defendant Schiff was employed by C. F. C. from the latter part of July 1960 to the end of September 1960. Just one month shorter than the defendant, Levine, yet all substantive counts occurring prior to his employment are set aside, regardless of the fact that he made representations to, as the Court says, victims and is guilty of conspiracy with all of the defendants.

2. Defendant Roberts was a part time employee of C.F.C. between August 1959 to April 1960, approximately nine months, he was also a Vice-President of the company. He was in the organization six months longer than Appellant, George Levine, and made representations to so called victims. Yet his conviction was set aside as to substantive counts occurring when he was not employed. His conviction as to conspiracy with all the others stands.

3. Gibbons was employed for three months, was a treasurer of the company, made representations and his conviction of conspiracy with the others was not disturbed.

Appellant fails to see how his position would be different from the other three defendants. Seven of the substantive offenses, as alleged, were committed prior to his having any connection with the organization. He made no representations to so called victims on those substantive counts, he had nothing to do with the mailings and he had nothing to do with the policy of the company and was by the gov-

ernment's own evidence a party to the organization from July 22, 1960, to October 31, 1960.

This Court wrote in its opinion on page 13 the following:

> "but with respect to the substantive counts there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and acts done in furtherance, to warrant submission of the separate charges to the jury."

How can this court in its sound judgment say that Appellant, George Levine, had the specific intent to participate in the substantive offenses committed prior to July 22, 1960. How can this Court say that he, George Levine, had the intent to participate in the scheme when at the time the offenses were committed he had no knowledge of the scheme. How can this Court say that he, George Levine, had the intent to participate in the acts done in furtherance of the scheme when he had no knowledge of them. This Court by its opinion is saying that Appellant, George Levine, by joining this organization on July 22, 1960, had the specific intent necessary for the commission of all of the substantive crimes committed prior to that date even though he could not possibly have any knowledge of the commission of such substantive offsences.

That, in this Court's opinion was the law as to Roberts, Gibbons, and Schiff, but was not as to Appellant, George Levine. Why? The Court intimates that it is because Levine had a proprietory interest. I am sure that this Court does not intend to say that if a person purchases an interest in an organization which is later charged with fraud, that in so doing, said person should be held crim-

inally liable for any substantive offense requiring a criminal intent, which is knowingly and wilfully committed by employees or principals of the organization prior to his purchasing an interest.

Appellant contends that this is not the law, and therefore the conviction of Appellant, George Levine, on all substantive counts committed prior to July 22, 1960, should be set aside.

WHEREFORE, the Appellant, George Levine, respectfully requests this Court to grant the Appellant's Petition for Rehearing in this cause.

Respectfully Submitted,

MAX LURIE
Attorney for Appellant
1409 Biscayne Building
19 West Flagler Street
Miami, Florida

STATE OF FLORIDA)
COUNTY OF DADE) ss.

MAX LURIE, being first duly sworn, deposes and says: That he is of counsel for the Appellant in the above entitled cause and that he has this 23rd. day of March, 1965, mailed a true copy of the foregoing Petition for Rehearing to the following: EDWARD F. BOARDMAN, United States Attorney for Appellee, Federal Building, Jacksonville, Florida, and he further states that this petition is presented in good faith and not for the purpose of delay.

MAX LURIE

Sworn to and subscribed
before me this 23rd day
of March, 1965.

s/ Gladys Hickey
Notary Public, State of Florida

My Commission expires:

Notary Public, State of Florida at Large
My Commission Expires June 11, 1965
Bonded by American Surety Co. of N.Y.

(SEAL)

APPENDIX D.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of Florida

---

OPENING BRIEF OF APPELLANT, GEORGE LEVINE.

MAX LURIE, ESQUIRE
1409 Biscayne Building
Miami, Florida 33130
Attorney for Appellant,
GEORGE LEVINE.

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INTRODUCTION

The parties will be referred to in the position they occupied in the trial court. Inasmuch as defendant George Levine and the Assistant United States Attorney, Arnold Levine, have the same surname, defendant George Levine will be referred to as "defendant Levine" and Arnold Levine will be referred to as "the Prosecutor". Reference to the record-on-appeal will be by the use of the symbol "R".

STATEMENT OF THE CASE AND FACTS

Defendant George Levine was accused jointly with ten other co-defendants of violating the anti-fraud provisions of the Securities Act of 1933, committing acts of mail fraud and conspiracy. Specifically, the indictment contained five counts setting forth violations of 15 U.S.C. 77q(a), fraud in the sale of corporate securities, four counts setting forth violations of 18 U.S.C. 1341, mail fraud and one count of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371.

In seven counts, the alleged substantive acts occurred prior to the time defendant Levine was alleged to have joined the other defendants. All of the counts involved the use of the mails. The only overt act alleged in the conspiracy count as to defendant Levine was that on August 15, 1960, Levine induced Stella Grace Johnston to renew a $10,000.00 note and to increase her investment to $12,000.00 When Stella Grace Johnston was placed on the witness stand she at no time identified the defendant George Levine.

After trial on the above charges, the Defendant Levine was convicted of ten counts as were all other defendants.

Defendant Levine's motion for new trial was denied and he was sentenced for a period of fifteen months on each count with the sentences to run consecutively or a total sentence of twelve and one-half years.

Quite simply, the facts are that Credit Finance Corporations, a Florida corporation, was incorporated on November 19, 1958 (Gov't. Ex. 2). The corporation's activities were confined to lending money to automobile purchasers and to purchasing real property for the development of subdivisions and commercial properties (R. 4293, 4294).

Defendant Norman Gradsky contributed $78,127.90 as capital and surplus to commence the corporate business (R. 3504).

Credit Finance Corporation on April 3, 1959, started to sell corporate notes to the public which paid 12 per cent interest and later 8 per cent interest (R. 1388, 1389, 1841).

Credit Finance Corporation's stock was purchased on or about April 1, 1960 by Security Guaranty Company (R. 3630-3638).

Security Guaranty Company on or about July 22, 1960, relinquished control of Credit Finance Corporation or the management of Credit Finance Corporation was changed (R. 3637). The name *Security Guaranty Company* and the date *July* 22, 1960 has important significance to defendant Levine because the Government attempts to prove its case against Levine beginning on July 22, 1960.

Yet, not a single record, book or paper of Security Guaranty was produced in evidence. The Government, during

the course of the trial had taken the records, books and papers of Security Guaranty Company and placed them in the trunk of a car of a United States postal inspector and then directed the inspector to drive with the records across the State of Florida (R. 3634, 3783, 3785-3787, 3901, 3993).

The deliberate and/or negligent suppression of the records of the Security Guaranty Company by the Government will be treated at great length in one of the Points on this appeal.

The testimony is replete with statements that interest payments were promptly received. There is also testimony that the Chamber of Commerce and Better Business Bureau gave its stamp of approval to Credit Finance Corporation (R. 1866). In addition, an auditor from the office of the Comptroller of the State of Florida testified that in September 1960, he checked the conditional sales finance contracts issued by Credit Finance Corporation and that the finance company was given a clean bill of health (R. 2560, 2573).

Nevertheless due to fortuitous business conditions, Credit Finance Corporation, which was controlled by Security Guaranty, failed and as a result many people who had invested their money to garner more than the usual rate of interest, suffered financial losses.

It was only after the financial losses that complaints were made to the authorities and the Government charged the defendants with employing a scheme to defraud and obtain money by false representations.

By the time the trial had started, newspapers, tele-

vision and radio publicity had saturated the community with details of the alleged crimes. The respective counsel for the ten defendants were compelled to seek additional peremptory challenges in order to obtain a fair and impartial jury (R. 67-71). The Court refused to grant a single additional challenge (R. 67-71). The Prejudice which resulted to the defendants because of the denial of addition peremptory challenges will be found in Points I and II of this brief.

The Government's two chief witnesses were Mrs. Hightower, a former employee of Credit Finance Corporation and Security Guaranty Company, who was never indicted by the Government, and George M. Callahan, a Security and Exchange Commission accountant.

Mrs. Hightower prior to trial had given her statement to an agent of the Securities Exchange Commission. During the cross-examination of Mrs. Hightower she admitted that the statement prepared by the Government was not accurate (R. 1458). She advised the agent for the S.E.C. that the statement they had drafted of her report to them was not true (R. 1460, 1465). When it appeared that the Government had several different statements of Mrs. Hightower which they had not produced when requested by defendants under the authority of the so-called Jenks Act, a motion for mistrial was made and denied (R. 1483, 1484). Mrs. Hightower testified that fifty per cent of the statement that was produced was misreported (R. 1492).

George M. Callahan, the accountant for the Securities and Exchange Commission, testified for a period of four days (R. 3435-4014). He stated that he made an audit of Credit Finance Company from December, 1958 until

October 31, 1960 (R. 3436). He prepared a balance sheet of Credit Finance Corporation dated July 22, 1960 (R. 3485). In addition, Mr. Callahan prepared what he termed a cash flow statement for Norman Gradsky, B. J. Gradsky and related corporations (R. 3500). During his examination he admitted that he would treat a sale by Credit Finance for purposes of this investigation as a loss whereas the same type of sale would be treated as reflecting an asset if he were investigating Credit Finance for income tax purposes (R. 3540). Mr. Callahan repeatedly testified that he had omitted to credit certain items in the two charts he prepared, which items would have enhanced the assets of the Credit Finance Corporation (R. 3567, 3580, 3610, 3650). He further admitted that he left out items on the balance sheet without even checking to determine the value of the items which he deleted on the balance sheet (R. 3651, 3655, 3657, 3732, 3737, 3742, 3749). He further admitted that he didn't even try to find among the papers of Security Guaranty Company an agreement and amendment between Security Guaranty, Credit Finance and a Mining Royalty Company, which involved a transfer of properties from Credit Finance Corporation and Security Guaranty Company to Mining Royalty Company in exchange for 519,000 shares of the latter's stock (R. 3895-3905).

Mr. Callahan testified that the figures on the balance sheet reflecting the financial condition of Credit Finance Corporation on July 22, 1960, were based upon events taking place as late as May, 1962 (R. 3958, 3966).

Prior to Mr. Callahan taking the witness stand, a motion to produce was filed with the Court in order that the records of Security Guaranty would be available to the

defendants (R. 3411, 3412). The Court denied the motion (R. 3412).

Attorney, David C. Clarke, who made the motion to produce on behalf of all the defendants, was appointed by the Court to represent defendant Grene (R. 4052). Mr. Clarke testified that on the day of his court appointment, he requested to see certain records of the Security Guaranty Company, and that he went to a room where the Government was holding the Security Guaranty records (R. 4052, 4053). He further testified that he saw an original agreement and amendment to agreement between Security Guaranty, Credit Finance and Mining Royalty Company (R. 4054, 4055). Mr. Clarke then stated that while he was looking at these documents, a Government agent asked him to leave the premises as he would be supplied with copies of the documents he needed (R. 4055).

The Government did not supply him with the copies as promised and the Government, through its agents, told him the documents were taken either to Daytona Beach or Jacksonville (R. 4055, 4056).

Referring now to the closing argument of the prosecutor, he stated that attorney Rosen told the jury that Mr. Clarke filed a motion to produce the records of Security Guaranty (R. 4269). Mr. Rosen interrupted to state that there was a denial of the motion to produce (R. 4269). The trial judge interjected that "there is no such motion in the record." (R. 4269). The Court further stated that attorney Rosen was misinformed (R. 4269). The trial judge continued with his beratement of attorney Rosen by stating "there was never such motion presented to me. Never such motion. Nothwithstanding your statement." (R. 4270). The prosecutor then accused attorney Rosen

of questioning the integrity of the agents for the Security and Exchange Commission, the prosecutor's integrity, and the Court's integrity (R. 4270). Defendants' motion for mistrial was denied (R. 4277, 4278, 4281).

Adverting to the instructions to the jury, the trial judge charged:

> "The Grand Jury returned an indictment and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on trial . . . and unless they answer they should be convicted." (R. 4299).

The trial judge further instructed the jury that the Security and Exchange Commission has enacted a statute that provided that any Securities that may be transported in interstate commerce from one state to another where there is a scheme or artifice to defraud and misrepresent the security in the transportation, the law is violated (R. 4291, 4292). The Court in this vein further charged the jury that "there was very little testimony about transporting from one state to another." (R. 4296). Exception was taken to the Court's charge relating to interstate transportation of securities in that none of the counts in the indictment involved such an issue (R. 4342).

These prejudical charges as well as others will be discussed in the Points, infra.

NO IDENTIFICATION OF DEFENDANT LEVINE

Defendant Levine was identified by Mrs. Hightower as having something to do with Security Guaranty Company since the latter part of July, 1960. Seven of the counts concerned periods of time prior to July, 1960.

Defendant Levine was required to sit through a trial that lasted from June 11, 1962, until July 19, 1962. Witness Robert M. Palmer an attorney and a Government witness testified that George Levine asked him to come to Orlando to check over the records of a finance company which he was interested in purchasing (R. 951-953). Mr. Palmer was hired by defendant Levine in order to determine that the finance business, which he was interested in acquiring, was in good order and that the operation was legitimate (R. 965).

There then followed an endless parade of witnesses and the typical answer of each witness in regard to defendant Levine is illustrated below.

Witness Cleora Patterson, a bookkeeper for Credit Finance Corp. stated that she neither saw defendant Levine nor heard his name in connection with any other companies. (R. 997, 998).

Witness Frieda Virack stated that she never saw George Levine (R. 1095).

Witness Jack Rothmeier stated that he did not know George Levine except what appeared in the newspapers (R. 1133, 1134).

Witness Alice Williams, who stated that she knew defendant Levine (R. 1183) was unable to identify Levine (R. 1184).

Witness Harley Steich stated that he doesn't know defendant George Levine (R. 1225).

Witness Frank Davie stated that he doesn't know defendant Levine (R. 1316).

Witness Milton Grawl, who is alleged as having received a letter through the mail in count one, doesn't know defendant Levine (R. 1377, 1378).

Witness John F. Kessel stated he never met defendant Levine (R. 1828).

Witness Walter Kryway, who is alleged in count three as having received a letter in the mail stated that he did not know defendant Levine (R. 1940).

Witness Jackie Stemper, who is alleged in count six as having received a letter in the mail stated that he did not know defendant Levine (R. 1978).

Witness Walter H. Verpualt, who is alleged in count seven as having received a letter in the mail stated that he did not know George Levine (R. 2164).

Witness Franklin Lyman, who is alleged in count four as having received a letter in the mail stated that he did not know George Levine (R. 2182).

Witness John A. Day who handled television contracts for the two finance companies, Credit Finance Company and Security Guaranty, stated that he never dealt with defendant Levine (R. 2286).

Witness John P. Hare stated that he never did any business with defendant Levine and that he never saw defendant Levine (R. 2358).

Witness Leroy Dustin testified that he did not know defendant Levine (R. 2378).

Witness Henry Rozmus testified that he met defendant Levine in August 1960, but then he identified another defendant as being defendant Levine (R. 2461, 2481).

Witness Ben D. McAndrew who had financed the purchasing of some airplanes by Credit Finance Company in 1959, (R. 2755) stated that he did not know the defendant Levine and that he never had any dealings with defendant Levine (R. 2780, 2827, 2829).

Witness Arthur Templeton also testified that he did not have any dealings with defendant Levine (R. 2854).

Witness James Payne testified as the others that he did not know defendant Levine (R. 2890).

Witness Carl Mullis testified that he did not know defendant Levine (R. 2904).

Witness Charles Choate testified that he had no dealings with defendant Levine (R. 2917).

Witness Robert Kohler testified that he neither had business dealings with defendant Levine (R. 2927, 2966), nor had he known defendant Levine (R. 2966).

Witness Stephen Beckman likewise testified that he had no business dealings with defendant Levine (R. 3013).

Witness Bonnie Stiegele testified that she had no dealings with defendant Levine (R. 3130).

Witness Billy E. Davis testified that he had no dealings with Levine and doesn't know Levine (R. 3149).

Witness Parker Capps, who sold some equipment to Credit Finance Company in August, 1959, stated that defendant Levine had nothing to do with the transaction (R. 3170).

Witness George Harrington stated that he did not know defendant Levine (R. 3210).

Witness Arthur F. Beyerle testified that defendant Levine had nothing to do with the lease entered into by the finance company (R. 3260).

Witness Robert D. Cunningham who sold a plane to Security Guaranty Company in July, 1960, testified that he did not know defendant Levine (R. 3355).

Notwithstanding all of the foregoing, defendant Levine was found guilty of the ten counts in the indictment, and he appeals from the judgment of guilt and sentence.

SPECIFICATONS OF ERROR

I.

The Court Erred in Overruling the Challenge for Cause Directed to Juror (Mrs.) Lewis Where Her Statement that the Defendants Must Come Forward With Evidence, Would Definitely Influence Her Verdict.

II.

The Court Erred in Denying Defendants Request for Additional Peremptory Challenges.

III.

(A) The Court Erred in Denying the Motion to Produce the Records of Security Guaranty Company.

(B) The Court Erred in Denying the Several Motions to Strike Testimony Relating to Security Guaranty Company.

(C) The Court Committed Fundamental Error in Allowing the Prosecutor to Suppress the Records of Security Guaranty Company Which Were Essential to a Proper Determination of the Cause.

(D) The Court Erred in Denying the Motion for Mistrial (R. 4277) Based Upon the Court's and Prosecutor's prejudicial Statements in Regard to the Records of Security Guaranty Company.

(E) The Court Erred in Denying the Motion for New Trial on the Grounds Relative to the Suppression of the Records of Security Guaranty Company.

IV.

The Court Erred in Instructing the Jury That the Defendants Must Answer the Indictment or be Convicted.

V.

The Court Erred in Admitting Charts of the Balance Sheet of Credit Finance Corporation and the Cash Flow Statement of the Gradskys Where Such Charts Were Based Upon Books and Records not in Evidence and Upon Personal Conclusions of a Government Employee.

VI.

The Court Erred in Denying the Motion for Judgment of Acquittal for Defendant Levine and in Denying the Motion to Strike as to Counts Three — Nine of the Indictment.

VII.

Omnibus Point

(Defendant Levine Relies Upon all Specifications of Error Raised by the Other Defendants and Their Argument Thereunder).

I.

The Court Erred in Overruling the Challenge for Cause Directed to Juror (Mrs.) Lewis Where Her Statement that the Defendants Must Come Forward with Evidence, Would Definitely Influence Her Verdict.

Amendment VI, of the Constitution of the United States of America guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury****" (Emphasis Added)

This amendment does not mean that a majority of the jury of twelve should be impartial and unbiased. A fair and impartial trial contemplates a trial before a jury of twelve impartial and unbiased men, neither more nor less. *Baker v. Hudspeth*, 129 F.2d 779 (C.A. Kan. 1942).

This particular trial was preceded by extensive newspaper, television and radio accounts concerning the alleged criminal acts of the defendants. Of course under such circumstances a duty devolves upon the trial court to make certain that the necessary conditions of a fair trial have not been impaired. Prospective jurors should be closely examined to determine whether they have been exposed to improper information and, if so, whether they can lay aside what they have read and heard in reaching a verdict. *United States v. Milanovitch*, 303 F.2d 626, 629 (4th Cir., 1962).

Defense attorneys, well aware of the difficulty in finding twelve impartial and unbiased jurors, requested additional challenges prior to the voir dire of the jury panel. Notwithstanding the fair and reasonable request for additional peremptory challenges because of the atmosphere surrounding the trial, the court refused to grant a single additional challenge (R. 67-71).

Rule 24(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., in contemplation of the very circumstances confronting the ten defendants and their respective counsel, provides that the court may allow additional peremptory challenges. The prejudicial effect of the trial judge's clear abuse of his judicial discretion in denying additional challenges is vividly seen by the following occurrences.

Prior to the voir dire examination of Mrs. Lewis, the ten dependants, because of the unfavorable publicity of the news media, were compelled to exercise their ten joint peremptory challenges to reject those jurors who demonstrated indications of bias. So when Mrs. Lewis was summoned, the defendants had exhausted all of their peremptory challenges. If a prospective, prejudiced juror is impaneled after all ten peremptory challenges are exhausted, the defendants are then free to complain that they were not tried by an impartial jury. *Jordan v. United States*, 295 F.2d 355 (10th Cir. 1962).

Juror, Mrs. Elizabeth J. Lewis, stated during the voir dire examination that she was a secretary at the Florida National Bank for over sixteen years (R. 587, 588). She was a secretary in the loan department to the vice-president of the bank (R. 596, 597). At this juncture, it would be a fair statement to say that her place of business was

in some categories of banking and financing a competitor of the defendants.

Mrs. Lewis after further examination testified as follows:

"Q. Now in connection with that will you hold the Government to the proof on that matter? Will you require that the Government prove beyond and to the exclusion of any reasonable doubt that Mr. Meadors knew about any scheme to defraud? Will you hold the Government to that proof? Will you hold the Government to that proof, ma'am?

"A. I wouldn't hold anybody to it. *I would listen to both sides* first *before I could make my mind up.* (Emphasis Added).

"Q. You understand . . . Let me get this clear. Now you understand that the defense doesn't have to say a word in this matter. Do you understand that? You understand that Mr. Meadors isn't obligated to say one single word in this case?

"A. Oh, I see.

"Q. You understand that the burden is upon the Government to establish their case.

"A. Oh, yes, I see what you mean.

"Q. Now let me ask you this question again. Will you hold the Government to that proof, and will you require the Government to prove their case against my client, Mr. Meadors, beyond and to the exclusion of any reasonable doubt? Will you require them

to prove and not require him to prove a thing?

"Q. *I think it should be both sides to prove it.* Maybe I don't understand your question. (Emphasis Added).

"Q. Let me ask you. Then it is your view that *both sides should come forward with evidence in this criminal case?* (Emphasis Added).

"A. Well I thought that was the procedure. I never served.

"Q. I don't know how I could make it any plainer, ma'am.

THE COURT: Those matters relate to the question of peremptories and not for cause.

"BY MR. STAHLEY:

"Q. Ma'am, let me ask you. Let me ask you one other question. I think I can bring this to cause. Do you have *a firm conviction* in your mind *that my client,* Mr. Meadors, *should come forward with evidence in this case if he is on trial?*

"A. I think so." (Emphasis Added).

The trial judge's comment concerning the prospective juror's attitude, which attitude would definitely influence her verdict when the defendants did not take the stand, was simply "She just doesn't know about those things." (R. 601) The Court then denied a motion to challenge the prospective juror for cause (R. 601). Defendants in a futile attempt to gain a fair and impartial jury moved,

once again, for additional peremptory challenges. The motion was denied (R. 604).

The trial judge aggravated his fundamentally prejudicial error when he instructed the jury:

> "The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was *unless there was an answer to it* . . . they should be put up on trial . . . *and unless they answered they should be convicted.*" (Emphasis Added) (R. 4299).

This instruction was exactly on point with Mrs. Lewis' firm belief that a defendant should come forward with evidence in a criminal trial. For she was asked whether she had a "firm conviction" in her mind that a defendant should come forward with evidence in a case where he is on trial. She stated "I think so." (R. 601).

As stated above, the accused is entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt., 155(b).

Lord Coke also says that a principal cause of challenge is

> "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." Co. Litt. 156(b).

So it is with the juror Mrs. Lewis, because of her attitude and opinion that a defendant must come forward with evidence, that nothing is left to her conscience or discretion. It is obvious that she will enter a verdict of guilty

against a defendant who fails to take the stand. Mrs. Lewis' bias, prejudice or misconception of the law clearly reflects an attitude that would definitely influence her verdict.

Defendant Levine contends that Mrs. Lewis' statement that she has a firm conviction that the defense must come forward with evidence is such a manifestation of partiality as to leave nothing to her conscience or discretion as a trier of fact. Cf. *Reynolds v. United States*, 98 U.S. 145; *Beck. v. United States*, 298 F.2d 622, (9th Cir. 1962). As a juror she is incompetent when she places upon the defendants the burden of "removing" the evidence presented by the prosecution.

The trial judge by denying the challenge for cause to Mrs. Lewis placed the defendants in a position of having to waive their Constitutional privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States or risk conviction as to juror, Lewis. Nowhere in our system of criminal jurisprudence is a defendant forced to take the witness stand because a juror demands a defendant to present his "side" of the case. See *Redfield v. United States of America*, 315 F.2d 76 (9th Cir. 1963); *DeLuna v. United States*, 308 F.2d 140, (5th Cir. 1962).

Mrs. Lewis' firm belief that a defendant must take the stand is tantamount to denying the accused the benefit of a presumption of innocence. When a juror's attitude is such that he cannot give the accused the benefit of the presumption of innocence, he is incompetent to serve in a criminal case.

It is astounding that a trial judge in a criminal case, where there is no requirement for a defendant to take the

stand, permitted a juror to be impaneled who would vote for a guilty verdict unless the defendant answered the prosecutor's evidence. The trial court's action, at the conclusion of the prosecutor's case and after the defense had offered no evidence, in charging the jury that the defendants should be convicted unless they *answered* the indictment against them, further astounded the writer of this brief whose only acquaintance with the trial is limited to the "cold" record (R. 4299).

The trial judge paid no heed to the requirement of the Sixth Amendment that the jury be an *"impartial jury"*. Therefore, this Court in preserving our basic and fundamental right to trial by an impartial jury should reverse the trial court under Point I. It is also to be pointed out that the abundance of evidence or the lack of evidence proving guilt has no effect upon prejudical error committed in the selection of a biased jury.

II.

The Court Erred in Denying Defendants Request For Addition Peremptory Challenges

Defendant Levine adopts by reference all of the argument under Point I. Defendant Levine was entitled to be tried by an unprejudiced and legally qualified jury. He was confronted with overcoming the biased and prejudiced opinions of the people of the community in which he was being tried because of extensive derogatory publicity. Proceeding properly, defendant Levine along with the other defendants requested additional peremptory challenges prior to the voir dire of the jury panel (R. 67-71). The request was denied. Rule 24(b) of the Federal Rules of

Criminal Procedure, 18 U.S.C.A., provides "If there is more than one defendant, the Court may allow the defendants additional peremptory challenges***." The trial judge clearly abused his judicial discretion and violated the clear intent of the Rule when he denied the request. During the voir dire examination almost every prospective juror stated that he knew about the case and about the "12 per centers". Others associated the case with a convicted murderer of a state trial judge, which murderer had a business that coincidentally paid "12 per cent" on borrowed money.

The prejudicial error of the trial court was clearly manifested when defendants were compelled to exhaust all ten peremptory challenges to reject biased jurors and then had no peremptory challenges left to reject Mrs. Lewis. Defendant Levine and the other defendants at this time afforded the trial judge a second opportunity to conduct a fair trial by repeating their request for additional peremptory challenges. The trial judge clearly abused his judicial discretion by refusing the second request for additional challenges (R. 604).

The purpose of granting additional peremptory challenges is to assist in the selection of a fair and impartial jury. *United States of America v. Fujimoto*, 107 F.Supp. 865 (D.C. Hawaii 1952). The trial judge's arbitrary refusal to grant at least *one* additional challenge before the voir dire or after Mrs. Lewis was examined resulted in the selection of an incompetent juror.

The trial court's action must not be affirmed under this point, if criminal Rule 24(b), supra, is to be effective in promoting the selection of a jury of twelve fair men.

POINT III.

(A) The Court Erred in Denying the Motion to Produce the Records of Security Guaranty Company.

(B) The Court Erred in Denying the Several Motions to Strike Testimony Relating to Security Guaranty Company.

(C) The Court Committed Fundamental Error in Allowing the Prosecutor to Suppress the Records of Security Guaranty Company Which Were Essential to a Proper Determination of the Cause.

(D) The Court Erred in Denying the Motion for Mistrial. (R. 4277) Based Upon The Court's and Prosecutor's prejudical Statements in Regard to the Records of Security Guaranty Company.

(E) The Court Erred in Denying the Motion for New Trial on the Grounds Relative to the Suppression of the Records of Security Guaranty Company.

As set forth in the Statement of the Case and Facts, Credit Finance Corporation's stock was purchased on or about April 1, 1960 (R. 3630-3638). Security Guaranty Company on or about July 22, 1960 was purchased by defendant Levine (Indictment, Count I).

The tremendous importance of all matters connected with Security Guaranty Company is immediately apparent by a reading of the indictment returned against defendant Levine. This indictment in paragraph two of the first count which alleges how the scheme to defraud was organized and came into existence states that Credit Finance

Company's stock was sold to Security Guaranty Company and that company in turn was purchased by defendant Levine on July 22, 1960.

To illustrate to the Court the importance of Security Guaranty Company's papers, books, and records, a resume of the testimony and argument concerning Security Guaranty Company will follow.

Referring to the proceedings at the trial we find S.E.C. agent Callahan testifying that to the best of his knowledge all of the records pertaining to Credit Finance Corporation and some of the records of Security Investment (sic) were in the courtroom (R. 1060, 1061).

Mrs. Hightower testified that Security Guaranty Company took over the records and bank accounts of Credit Finance Corporation on April 1, 1960 (R. 1698, 1709).

A Mr. Dey was permitted to testify that he was handed a prospectus from defendant Grene concerning Security Guaranty Company in April 1960 (R. 2257). He then testified that defendant Grene advised him that Security Guaranty was a new financial company, which was about to launch an extensive advertising campaign (R. 2259). Further testimony was to the effect that Security Guaranty Company entered into an advertisement contract with Mr. Dey's station in Orlando (R. 2264).

A Mr. Harrington from Pensacola, Florida, testified that Credit Finance Corporation had an office in Pensacola and that later the name on the office window was changed to Security Guaranty Company (R. 3202). He also stated that he wrote to a Mr. John Courson of the Security Guaranty Company concerning past due rent for

July, August and September 1960 (R. 3209). Mr. Harrington then testified that he was told by defendant Gradsky that Security Guaranty Company had purchased from Mr. Gradsky all the stock of Credit Finance Corporation (R. 3226).

Witness Robert Cunningham who was in the business of selling airplanes testified that Security Guaranty Company purchased a $17,000.00 aircraft from his company on July 6, 1960 (R. 3332).

Subsequently, Mr. Clarke, defense counsel for Mr. Grene moved to produce the records of Security Guaranty Company (R. 3411, 3412). The Court, notwithstanding the crucial need for the records of a company which allegedly ran the "show" from April 1960 to October 31, 1960, denied the motion (R. 3412).

The Securities Exchange Commission agent, Callahan, testified that as of June 1, 1960, the stock of Credit Finance Corporation was owned by Security Guaranty Company and that defendant Gradsky had a controlling interest in Security Guaranty Company (R. 3458). Mr. Callahan repeated this same testimony that defendant Gradsky had the controlling interest in Security Guaranty Company several more times (R. 3631-3633).

On page 3633 of the record Government agent Callahan testified that he saw the stock book of Security Guaranty Company and he testified as to the number of shares issued by such company and to whom the share were issued. He was then asked where he saw the stock book of Security Guaranty and he answered that he saw it right here in the building (R. 3634). He was asked if he had the book. He stated that he did not (R. 3634). When inquiry was

made of Mr. Callahan as to where the books and records of Security Guaranty Company were, he replied that the postal inspectors have the books (R. 3634). He went on to state that "Mr. Al Francis (a postal inspector) had possession of them and he left town *this morning* I believe to go over to Tampa and then to Miami." (R. 3634). He was then asked:

> "Q. Yes Sir. So then as far as this trial is concerned the books and records of Security Guaranty are not available?
>
> "A. No." (R. 3634).

Mr. Callahan again repeated his statements to the jury that Security Guaranty Company controlled Credit Finance Corporation from April 1, 1960 up to and including July 22, 1960 and that on or about July 22, 1960 there was a change in Security Guaranty's management (R. 3636, 3637).

Mr. Callahan also testified that defendant Glaser owned 129,000 shares of stock in Security Guaranty Company (R. 3782), but, of course, he did not have the stock book to support his testimony.

Callahan went on to state that the stock book of Security Guaranty Company reflected the above information, and he further admitted that the book in question is not in evidence (R. 3782). He then stated that the books of Security Guaranty Company were in the custody of the postal inspector (R. 3783). Mr. Callahan admitted that the records of Security Guaranty Company were at one time in possession of the United States Attorney's Office and that they were later turned over to postal inspector,

Al Francis, who was driving his automobile with the records from Tampa to Jacksonville (R. 3785-3787).

Notwithstanding the suppression of the evidence, witness Callahan was permitted to testify at length concerning the books and records of Security Guaranty Company (R. 3789-3800).

Mr. Callahan admitted that although he checked the records of Security Guaranty Company he made up the balance sheet of Credit Finance Corporation which was dated July 22, 1960, without using the Security Guaranty Company records (R. 3900, 3901). When asked again for the records of Security Guaranty Company, he stated as usual that the postal inspector Al Francis had them in his automobile (R. 3901).

A motion to strike Mr. Callahan's testimony upon the grounds that it was based on books and records not in evidence was denied by the court (R. 4029, 2030).

Attorney David Clarke, defense counsel for defendant Grene, testified that on the day of his appointment by the court to represent Mr. Grene, he requested the prosecutor to permit him to see the records of Security Guaranty Company (R. 4052). Mr. Clarke went to a room where the Security Guaranty records were being held by the Government and he recalls seeing an agreement and amendment to agreement between Security Guaranty Company, Credit Finance Corporation and Mining Royalty Company (R. 4053, 4054). He then testified that he had to discontinue his investigation of the documents of Security Guaranty Company because a Government agent asked him to leave the room. The agent stated that he would furnish copies of the documents he wanted (R. 4055). The

copies of the documents requested were never made by the Government agent as promised (R. 4055).

On cross examination Mr. Clarke testified that he was allowed to see the records for a period of 3 minutes before the room containing the records was locked (R. 4055, 4056). He further testified that he filed a mtion for the production of the records of Security Guaranty Company (R. 4058).

The harmful and prejudical errors of the Court in denying the motion to produce the records of Security Guaranty, in denying the motion to strike evidence relative to Security Guaranty Company and the fundamental error committed by the Court in permitting the prosecutor to deliberately and/or negligently suppress the records of Security Guaranty Company was further compounded by the following statement of the prosecutor in his final argument.

The prosecutor stated that all attorneys are officers of the Court and their obligation to the Court exceeds even their obligation to the client they are defending, "but yet in discussing the records of Security Guaranty Mr. Rosen said that Mr. Clarke filed motions a motion to produce those records. Well that isn't so. Nowhere in that motion is there any mention of Security Guaranty, but yet he went on to say that this Court and I got together and at the last moment denied Mr. Clarke's motion to produce."

At this point Mr. Rosen jumped to his feet stating that the motion had been denied. The trial judge before the jury stated that there isn't any such motion in the record and that Mr. Rosen was misinformed (R. 4269). The trial judge reemphasized the point by stating "There was never

such motion presented to me. Never such motion. Notwithstanding your statement." (R. 4270). The prosecutor went on to state that Mr. Rosen did not speak the truth and that Rosen stood up and questioned the integrity of the Court and of the prosecutor (R. 4270). Mr. Rosen made a motion for mistrial which was denied (R. 4277).

The statements by the court and by the prosecutor during argument were impermissible since they were not based upon prior proceedings and especially since they reflected on the sincerity of counsel for all defendants. Cf. *Wagner v. United States*, 263 F.2d 877 (5th Cr. 1959). The trial judge clearly committed reversible error by failing to grant the motion for mistrial.

It is fundamental in attaining fair judicial administration that the prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the Government disclose the truth so that justice may be done then that some advantage might accrue to the prosecution toward insuring a conviction. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The requirement that the Government must prove its case beyond a reasonable doubt means, at the very least, that the Government itself should not, by any failure to disclose relative evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in criminal proceedings require that the Government should present its evidence in its true colors and it should never be a party to withholding any evidence which materially bears on the credibility of

the witness it places on the stand. *United States v. Zborowski*, 271 F.2d 661, 668 (2nd Cir. 1959).

In the case of *United States v. Consolidated Laundries Corporation*, 291 F. 2d 563, (2nd Cir. 1961), forty-three documents came into the Government's possession and they were relevant to testimony given at the trial by one of the prosecution's witnesses. Before trial the prosecution was ordered to turn over to defense counsel all documents which were material to the proof of the issues in the case. None of the forty-three documents was turned over to the defendants. The Court held that where the Government becomes custodian of evidence it must keep the evidence in such a manner that it will be available for use upon the trial by all parties. The Court granted a new trial to the defendant because of the negligent suppression of material evidence by the Government.

In the instant case the papers, books and records of Security Guaranty Company were relevant to the criminal charges as is seen from a reading of paragraph two of count one of the indictment, wherein it is alleged that defendant Levine purchased Security Guaranty Company. The records of Security Guaranty Company were essential to the defendants in order to test the credibility of numerous witnesses and especially the credibility of Mr. Callahan who testified for a period of four days.

Defendant Levine was charged in the indictment with having taken over the operation of Security Guaranty Company; yet, he was denied access to the records of that company. Suppression of the evidence under the circumstances of this case is so fundamentally unfair as to amount to a denial of due process of law. Therefore, the trial court seriously erred in denying the motion for new

trial on the grounds that material records were suppressed by the prosecution and were testified to although not offered into evidence. The denial of the new trial was inconsistent with the correct administration of criminal justice in the federal courts, and it is this court's duty in its supervisory capacity, as an appellate court, to correct the injustice.

At the very least, the omission of the Government in not having available for trial evidence in its possession constitutes a negligent suppression of material evidence entitling the defendants to a new trial. The manner in which the evidence disappeared is highly suspicious. Even if we assume that the prosecutor's failure to produce the evidence was not the result of guile or a desire to prejudice matters little, for its impact was the same, presenting as it did, a trial that couldn't in any real sense be termed fair. See *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217.

In McNaughton's revised 1961 edition of Wigmore on Evidence, Volume 8, Section 2224, there is contained the following statement:

> "It seems wise to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at trial to withhold from the inspection of the accused and the jury any documents or chattels relevant to the case unless they are otherwise privileged."

This Court has held that a summary of books is proper, but only where the original records are available. *Greenhill v. U.S.*, 298 F.2d 405 (5th Cir. 1962).

Defendant Levine is most aware that to retry this case

would probably consume another six weeks. But Defendant Levine did not have custody or possession of the papers, books and records of Security Guaranty Company. The prosecutor had such possession. It was the duty of the prosecutor to keep the evidence of which it was custodian in such manner that it would be available for use upon the trial by all parties. This duty was breached by the prosecutor or someone in the Government's employ. The failure to produce the records deprived all defendants of evidence which would have been helpful to them on points which were involved in determining their guilty. The fault and negligence can only be chargeable to one source—the Government.

It is respectfully submitted that the errors committed under this Point were most grievous and prejudical because the effect of the willful or negligent suppression of the records of Security Guaranty Company permeated the entire trial proceedings. No matter who is charged with the commission of a crime, the administration of justice must not only be beyond reproach, it must be beyond suspicion of reproach. This Court must not permit the action of the Government in literally driving evidence from the courtroom to be affirmed.

IV.

The Court Erred in Instructing the Jury That the Defendants Must Answer the Indictment or be Convicted.

The Court instructed the jury:

> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the

> Grand Jury, of course, its thought was *unless there was an answer to it* . . . They should be put up on their trial . . . *and unless they answer they should be convicted.*" (R. 4298, 4299). (Emphasis Added).

The Fifth Amendment of the Constitution of the United States provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . ." Title 18 Section 3481 provides:

> "In trial of all persons charged with the commission of offenses against the United States . . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This Court in its opinion of *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962) brilliantly depicted the history of the development of the privilege against self-incrimination. This latter statement is made with no intention of this writer to ingratiate himself with the Court. A perusal of the *DeLuna* case, supra, from pages 144 to 152 shows a thorough historical tracing of man's right to silence and the line of growth of the privilege against self incrimination. This Court stated:

> "The Supreme Court stands firmly for a broad view of the right. 'To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.'"

As pointed out by this Court the right against self-incrimination is the result of successive accretions and it is more important to consider its line of growth as indicative of an expanding right capable of encompassing

new and novel situations today as in the past. If the expansion of the individual's right of silence comes at the expense of the power and efficiency of the state, that is but in accord with the nature of the right and its historical development.

It is basic that all the defendants in this case are to be accorded the benefit of the presumption of innocence and they should not be penalized or have that presumption discredited because they rely on a Constitutional right. Therefore, any comment on an accused's silence is improper for either the judge or prosecutor.

In the *DeLuna* case, supra, the Court extended the Constitutional guarantee of right of silence free from prejudicial comment to include comments coming from a co-defendant's attorney.

This Court in *Perez v. United States*, 297 F.2d 12, 16, held that under no condition is it permissible to leave with the jury the idea that it had become the duty of the defendant to establish his innocence to obtain an acquittal.

The Court's instruction that unless the defendants answered the indictment of the Grand Jury they should be convicted, was but another method to prejudically comment to the jury that the defendants did not take the stand. Defendant Levine contends that this particular instruction was even more prejudical than a mere comment concerning a defendant's failure to testify. It is more prejudical because the charge was to the effect that "*they should be convicted*" unless they answered the indictment of the Grand Jury. The error of the trial Court in this regard was so fundamental in its denial of due process

that this Court must reverse the judgment and sentence against defendant Levine and all other defendants in this case.

V.

The Court Erred in Admitting Charts of the Balance Sheet of Credit Finance Corporation and the Cash Flow Statement of the Gradskys Where Such Charts Were Based Upon Books and Records not in Evidence and Upon Personal Conclusions of a Government Employee.

George M. Callahan, the accountant for the Securities and Exchange Commission testified that he made an audit of Credit Finance Corporation from December 1958 until October 31, 1960 (R. 3436). He further stated that he prepared a balance sheet of Credit Finance Corporation showing the assets and liabilities of that corporation as of July 22, 1960 (R. 3485). Notwithstanding that the figures on the balance sheet allegedly reflected the financial condition of Credit Finance Corporation on July 22, 1960, Mr. Callahan admitted under cross examination that many of the figures placed upon the balance sheet were based upon events taking place long after July 22, 1960 (R. 3958, 3966).

In addition to the balance sheet prepared by Mr. Callahan, he also prepared what he labeled "summary of cash transaction with or for Norman Gradsky, B. J. Gradsky, their family and related corporations" (Gov't. Ex. 238B). This chart contained no notations as to the source of the information placed on the chart.

The expert accountant, Mr. Callahan, who was in the employ of the Securities Exchange Commission testified

repeatedly that he had omitted to credit certain items in the two charts he prepared, which items would have enhanced the assets of the Credit Finance Corporation (R. 3567, 3580, 3610, 3650). He admitted that he deleted items from the balance sheet without even checking to determine the value of the items. He simply struck these items which reflected assets of Credit Finance Corporation from the balance sheet based upon his own personal opinion (R. 3651, 3655, 3657, 3732, 3737, 3742, 3749).

He did not bother with the important agreement and amendment to agreement between Security Guaranty Company, Credit Finance and Mining Royalty Company which involved a transfer of property from Credit Finance Corporation and Security Guaranty Company to Mining Royalty Company in exchange for 519,000 shares of the latter's stock (R. 3895-3905).

Of necessity, in cases which involve a great number of account books and records, expert summary of numerous account books and records is proper. However, because of the intricacy and extent of detailed figures, massed in evidence against an accused man, he is sometimes placed in a perilous position. Experts are known to differ on theories of accounting and they are not unknown to assume the function of advocacy in anlysis or statement. It is also true that experts in accounting are not always free from error and mistake of fact in figuring as well as in their theory.

Many of the figures on the charts in question are not supported by the records in evidence. Furthermore, many items were deliberately left out of the balance sheet and many items were depreciated on the balance sheet without the expert accountant showing any basis for the deprecia-

tion except his own conclusions based sometimes on events that occurred a year or more after the date reflecting the preparation of the balance sheet. Under these circumstances a proper foundation for the admission of the two charts was not shown and the Court should have granted the objections of the defendants to the admissions of these charts which were placed before the jury. *Greenbaum v. United States*, 80 F.2d 113, 120 (9th C.C.A. 1935). *Lloyd v. United States*, 226 F.2d 9 (1955); *Greenhill v. U.S.*, 298 F.2d 405 (5th Cir. 1962).

VI.

The Court Erred in Denying the Motion for Judgment of Acquittal for Defendant Levine and in Denying the Motion to Strike as to Counts Three-Nine of the Indictment.

In seven of the counts of the indictment against defendant Levine, the alleged substantive acts occurred prior to the time defendant Levine was alleged to have joined the other defendants. The only overt act alleged in the conspiracy count as to defendant Levine was that on August 15, 1960, Levine induced Stella Grace Johnston to renew a $10,000.00 note and to increase her investment to $12,000.00. When Stella Grace Johnston was placed on the witness stand, she at no time identified the defendant Levine.

It was alleged in the indictment that George Levine became a part of the scheme when he purchased the Security Guaranty Company on July 22, 1960. There was not introduced into evidence a single record, book or paper of Security Guaranty Company to show any connection whatsoever between defendant Levine and Security Guaranty Company. Defendant Levine challenges the Government

to demonstrate to this Court or to show to this Court a single exhibit of Security Guaranty Company wherein defendant Levine is associated with that company. The indictment charges Levine as having purchased Security Guaranty Company. There is a total failing of proof to establish this critical and crucial allegation of the indictment.

Defendant Levine also respectfully refers the Court to that section of the Statement of the Case and Facts wherein it is shown that defendant Levine was not identified by the interminable queue of witnesses that took the stand. The Government's witness, Robert M. Palmer, testified that defendant Levine asked him to come to Orlando to check over the records of a finance company which he was interested in purchasing (R. 951-953). Mr. Palmer stated that he was hired by defendant Levine in order to determine that the finance business which he was interested in acquiring was in good order and that the operation was legitimate (R. 965).

There are statements by Mr. Callahan, the S.E.C. agent, that business operations terminated on October 31, 1960, or approximately three months after defendant Levine was alleged to have entered upon the scene.

When Callahan testified as to who was issued stock in Security Guaranty Company, at no time did he state that the stock book reflected that defendant Levine owned a single share of Security Guaranty Company's stock.

Notwithstanding all of the above, defendant Levine was found guilty of all ten counts and sentenced to a prison term of fifteen years.

VII.

Omnibus Point

Defendant Levine relies upon all specifications of error raised by the other defendants and their argument thereunder.

CONCLUSION

The defendant Levine is entitled, as clearly demonstrated under the foregoing specifications of error, to a judgment of acquittal or to a new trial.

Respectfully submitted,

Max Lurie
Attorney for Appellant,
George Levine
1409 Biscayne Building
Miami 32, Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing brief of appellant George Levine was mailed to the United States Attorney, Federal Building, 300 N. E. First Avenue, Miami, Florida, this ..... day of July, 1964.

Max Lurie

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant George Levine in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant George Levine to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 9, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 9, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have

been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 9, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE,

CHIEF JUDGE.

Dated: (ORIGINAL FILED APRIL 19, 1965)

APPENDIX F.

(413)—Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida
(APRIL 9, 1965)

ON PETITIONS FOR REHEARING
Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM:

It is ORDERED that the petitions for rehearing filed by appellants Hogue, Roberts, Norman Gradsky, B. J. Gradsky, Robert Grene and Levine, be, and the same is, hereby DENIED.

APPENDIX G.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 19974

D. C. Docket No. 1271-Orl-Cr.

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for The Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons; the judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten; the sentences against Roberts on counts one, two, four, five, seven and nine are set aside; the judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten; the sentences against Schiff on counts one, three, four, five, six and seven are set aside; the judgment against Gibbons is affirmed as to the sentences on counts six and ten; the sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside; and that this cause be, and it is hereby remanded to the said District Court for further proceeding not inconsistent with the opinion and judgment of this Court.

March 11, 1965

Issued as Mandate:

APPENDIX I.

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Title 15, United States Code Annotated, Section 77q(a), Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, United States Code Annotated, Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such

scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code Annotated, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency therof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Trial Jurors

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is

entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 125

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1964

No.....

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner Robert B. Roberts, Appellant below, respectfully prays that a Writ of Certiorari issue to review so much of a Judgment of the United States Court of Appeals for the Fifth Circuit as affirmed, the Judgment of Conviction of the District Court for the Southern District of Florida, as to Counts Three, Six, Eight and Ten of the Indictment. The Court of Appeals reversed as to Counts One, Two, Four, Five, Seven and Nine of the Indictment. The Judgment, thus affirmed in part, was entered upon a general verdict after trial by jury.

Opinion Below.

The Opinion of the Court of Appeals is not yet reported but is printed in Appendix "A" to this Petition. A Petition for Rehearing was timely filed and

thereafter the Court of Appeals entered ints Order Denying Rehearing without Opinion (Appendix "B" to this Petition).

Jurisdiction.

1. The judgment sought to be reviewed was entered March 11, 1965.

2. Petitioner filed timely a Petition for Rehearing which was denied on April 9, 1965.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question are 28 U.S.C.A., Sec. 1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

4. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming in part has decided an important question of Federal law, arising under the criminal laws, which has not been, but should be considered and settled by this Court; has rendered a decision in conflict, on other questions involved, with the decisions of other Courts of Appeal on a similar matter; has decided other important questions of Federal criminal law, in a way in conflict with applicable decisions of this Court; and has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Questions Presented.

1. Did the Trial Court commit reversible error in failing to instruct the jury, when requested so to do by Petitioner, as to each element of the substantive crimes charged in the Indictment. And, does the de-

cision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Second Circuit in *United States v. Massiah,* 307 F. 2d 62; the Ninth Circuit in *Morris v. United States,* 156 F. 2d 525; the Fourth Circuit in *United States v. Hutchison,* 338 F. 2d 991; and with the District of Columbia Circuit in *Barry v. United States,* 287 F. 2d 340?

2. Did the Trial Court commit reversible error in the giving of erroneous jury instructions?

3. Did the Trial Court commit reversible error in giving conflicting jury instructions concerning conspiracy, mail fraud and corporate security fraud. And, does the decision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Sixth Circuit in *Smith v. United States,* 230 F. 2d 935, and with the Fifth Circuit in *Clifton v. United States,* 341 F. 2d 649, 650-651?

4. Was it reversible error for the Trial Court to admit testimony concerning Petitioner's buying a Hi-Fi set, under an assumed name, and giving a false credit reference in connection therewith, when this alleged incident had no connection whatsoever with any of the charges in the within case?

5. Was it reversible error for the Trial Court to send a copy of the Indictment to the jury, over objection, without a cautionary instruction with reference to the unproven charge of Petitioner's use of an alias alleged in the Indictment and without a further cautionary instruction that the unproven allegations in the Indictment should not be considered at all by the jury

and had been withdrawn. And, does the decision of the Court of Appeals in respect of that question in the instant cause conflict with the decisions of the United States Courts of Appeal for the Third Circuit in *D'Allessandro v. United States,* 90 F. 2d 640, 641; the Second Circuit in *United States v. Monroe,* 164 F. 2d 471; and the Second Circuit in *United States v. Grayson,* 166 F. 2d 863?

6. Was the Petitioner deprived of due process of law and his right to trial by an impartial jury when denied one additional peremptory challenge to a juror who stated that she felt a Defendant should come forward with evidence in a criminal trial?

7. Did the Trial Court commit reversible error in permitting declarations of a co-conspirator that were not in furtherance of the conspiracy, was merely a narrative statement, had no connection with the charges in the Indictment and were highly prejudicial. And, does that conflict with the rulings of this Court in *Lutwak v. United States,* 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481, and *Paoli v. United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294?

Statutes Involved.

The statutes involved are 15 U.S.C. 77 q(a), fraud in the sale of securities; 18 U.S.C. 1341, mail fraud; and conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. (The text of these statutes are set forth in Appendix "C" to this Petition).

Statement of the Case.

By Indictment filed June 14, 1961, Petitioner was accused jointly with ten other codefendants of multiple violations of 15 U.S.C. 77 q(a), fraud in the sale of securities (set forth in Counts One through Five inclusive of the Indictment); 18 U.S.C. 1341, mail fraud (set forth in Counts Six through Nine inclusive of the Indictment); and in Count Ten of the Indictment of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. Each of the substantive offenses in Counts One through Nine was listed as an overt act in Count Ten.

After trial on the above charges, Petitioner was convicted upon all Counts as were all other defendants. His application for probation was denied, as was his motion for new trial, and he was sentenced for a period of one year on each Count with the sentences to run consecutively.

The charges against Petitioner arose out of the operation and subsequent bankruptcy of the Credit Finance Corporation (herein referred to throughout as "CFC"), a Florida corporation. CFC was incorporated on November 19, 1958, with the Articles of Incorporation being signed by Defendant Leonard Glaser, as President and Director owning 100 shares of stock, Geraldine Glaser, as Secretary and Director owning 50 shares of stock, and by Sylvia Wagner, as secretary and Director owning 50 shares of stock, with all of the stock being issued at a price of $50.00 per share [Govt. Ex. 2]. Later, all of the stock was acquired by Defendants Norman and B. J. Gradsky and, in turn, sold by them to the Security Guaranty Company on April

1, 1960. Security Guaranty Company subsequently sold the stock to Defendant George Levine on July 22, 1960 [R. 941, 954, 983, 1395, 1435, 3457, 3630-3631, 3635].

CFC was formed for the principal purposes of lending money to automobile purchasers and purchasing real estate for development of subdivision and commercial building [R. 4293-4294].

During the Gradsky's ownership of CFC, Norman Gradsky was President [R. 1414]. During Security Guaranty Company's ownership, Robert Grene was President and later George Levine became President [R. 1414, 1419]. At no time did Petitioner have any financial interest in CFC as a shareholder or otherwise [R. 3881-3882].

CFC sold corporate notes to the public in denominations of $1,000.00 paying interest originally at the rate of 12% and later at 8% [R. 1388-1389, 1841]. The reduction in interest was necessitated by a change in Florida law limiting the interest rate to 8% [R. 1841]. The first such note was issued by CFC on April 3, 1959, and the last in October of 1960. In all, notes in the amount of approximately $528,400.00 were issued [R. 3480, 3872-3873].

The evidence indicated that during the Gradsky's ownership, CFC funds were used to assist in the purchase of their family residence and for the purchase of an airplane and Cadillac automobiles for them [R. 2613, 2733, 3507]. There was additional testimony that the total disbursement of CFC funds to the Gradsky family

and "related corporations" amounted to $541,968.25 [R. 3511]. As of July 22, 1960, CFC was insolvent and later became bankrupt [R. 798, 3624].

In the sale of the corporate notes certain representations were made to the potential purchasers. These included statements that CFC was a Florida corporation dealing in land and subdivisions; that CFC owned land next to a subdivision and an office building in Melbourne, Florida; that CFC was checked regularly by the State of Florida; CFC was making money from its investments; that CFC paid 8% interest and dealt in automobile paper; that the accounts were insured; and that CFC helped finance the Baptist Church in Orlando, Florida [R. 1239, 1283, 1570, 1397, 1405, 1918, 1985]. It should be noted that this last statement was made four months after Petitioner had terminated his employment with CFC [R. 1940, 3873-3875], and in truth, was not alleged in the Indictment [R. 2115]. CFC was audited by the Florida State Comptroller's office, did own buildings and deal in land and subdivisions and at times the corporate notes were secured by an assignment of accounts receivable equal to the amount of the note, thereby being insured [R. 1388-1389, 1344, 2126, 2560, 3450-3451, 3454-3455, 3465, Govt. Ex's 57-H and 31-T]. Petitioner's position throughout the trial was that his representations were made in good faith, honestly believing them to be true, and with no intent to defraud.

CFC maintained offices at both Melbourne and Orlando, Florida [R. 1015, 1381]. The Orlando office was

under the supervision of Defendant Gertrude Hogue who was a Vice President of CFC [R. 1388, 1396, 1403]. Petitioner was employed by CFC from August 15, 1959, to April 20, 1960, but only on a part-time basis [R. 1727, 1730, 3873, 3874-3875]. Part of his duties consisted of acting as salesman in the Orlando office [R. 1390]. He received instruction as to these duties from Defendant Hogue who was in charge of the Orlando office [R. 1450, 1726]. As of the time Petitioner ceased his employment with CFC, the Orlando office had received no complaints from customers that the interest and principal had not been paid [R. 1755].

During his employment by CFC, Petitioner received compensation totaling $2,618.70 which averaged $243.00 per month for the nine-month period. In addition, he was reimbursed for his out-of-pocket expenses [R. 3876-3877, 3879]. A SEC investigator testified that he found nothing improper or irregular in any of these payments.

At no time was Petitioner a Director or shareholder of CFC, have any financial interest in the company, nor was he authorized to sign checks on behalf of the company [R. 3880-3882]. He had no connection with the company books and records, made no entires therein and had no knowledge of the financial condition of CFC [R. 3880-3882, 3884-3885, 1755-1756]. He signed no deeds on behalf of CFC for the acqusition of real property and no contracts for the purchase of any personal property [R. 3885, 4011-4012]. CFC made no

payments for or on behalf of Petitioner. He borrowed no money from CFC and received nothing from CFC to which he was not entitled [R. 3887-3888].

There was no evidence that Petitioner mailed, signed, knew of any mailing or caused any mailing of letters of solicitation to the investors of CFC.

Of the several hundred Exhibits introduced during the trial, only ten pertained to Petitioner. Exhibit 4 was a certified copy of the Articles of Incorporation of Credit Realty Company on which Petitioner's name appears as one of the incorporators. The prosecution conceded that this signature was a forgery [R. 4236]. Exhibit 19 was Petitioner's appearance bond in the within action. Exhibits 74, 107 and 109 were CFC notes containing Petitioner's name as a Vice-President of CFC. Exhibits 96 and 108 were receipts for a note containing Petitioner's name. Exhibits 144 and 146 were letter agreements for advertising in which Petitioner's name appears as signing for CFC. In Exhibit 233B Petitioner's name appears as a witness to a lease. There was no evidence that Petitioner in fact signed any of these documents or that the signature thereon was his.

Of the more than 60 witnesses testifying, only 7 mentioned Petitioner. Kermit Harrison, a CFC bookkeeper, stated that in March and April 1960 Petitioner was in the Orlando office of CFC but that he wasn't doing anything [R. 943]. Mrs. Hightower, a secretary in the CFC Orlando office, testified that Petitioner was

reprimanded by Mrs. Hogue for telling a prospective customer that the money was insured and that he was told by Mrs. Hogue that he would be disharged if he did it again [R. 1452, 1739, 1751]. She further testified that Petitioner terminated his employment with CFC in April 1960 [R. 1391]. Stanton Mooney, an investor testified that Petitioner prepared, but didn't sign a note in the sum of $2,000.00 [Ex. 74, R. 1836-1837, 1901]. Mr. Ver Pault, another investor, testified that Petitioner picked up an expired note of his and signed a receipt for it and that Petitioner told him that a Florida regulation required the company to pay only 8 per cent instead of the 12 per cent previously paid [Ex. 96, R. 2132-2133, 2161]. Another investor, Mr. Kryway, testified that Petitioner helped him carry a television set to his car from the CFC office [R. 1932]. Mary Reilly, also an investor, stated she met Defendant Gibbons and Petitioner at the Orlando office in December 1959 and that in a conversation with them, she was told that the investor's money was insured [R. 2226, 2228]. She did not recall whether Gibbons or Petitioner made that statement [R. 2248]. George Callahan, a SEC investigator, testified as to Petitioner's salary and that he found nothing improper or irregular concerning these payments [R. 3876-3877, 3879]. He further stated that Petitioner was a part-time employee of CFC between August 1959 and April 1960 and after April 20, 1960, was no longer with CFC [R. 3873-3876].

REASONS FOR GRANTING THE WRIT.

1. **Did the Trial Court Commit Reversible Error in Failing to Instruct the Jury, When Requested so to Do by Petitioner, as to Each Element of the Substantive Crimes Charged in the Indictment? And, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Second Circuit in United States v. Massiah, 307 F. 2d 62; the Ninth Circuit in Morris v. United States, 156 F. 2d 525; the Fourth Circuit in United States v. Hutchison, 338 F. 2d 991; and With the District of Columbia Circuit in Barry v. United States, 287 F. 2d 340?**

Petitioner respectfully submits that it is a denial of due process of law, and plain error under Rule 52(b) of the Federal Rules of Criminal Procedure for the Trial Court to fail to instruct the jury as to all elements of the offenses charged and all applicable principles of law. Although it doesn't appear from the record, it should be noted that the Honorable Trial Judge instructed the jury extemporaneously without the benefit of any written instructions. Defense counsel were therefore precluded from any objections thereto prior to the giving of such instructions.

The following elements of mail fraud (18 U.S.C. 1341) and corporate security fraud (15 U.S.C. 77 q(a)) were entirely omitted from the Trial Court's charge to the jury.

A. That in mail fraud, the participant must have contemplated the use of the mails as a part of the execution of the fraud or were incident to

an essential part of the scheme. In corporate security fraud the use of the mails is necessary to give the Court jurisdiction. This was requested in Defendants' Instruction No. 4. *Parr v. U.S.*, 363 U.S. 370; 4 L. Ed. 2d 1277, 1290, 80 S. Ct. 1171 (1960); *Pereira v. U.S.*, 347 U.S. 1, 8, 98 L. Ed. 435, 444, 74 S. Ct. 358; *Milam v. U.S.*, 322 F. 2d 104, 109 (5th Cir.). As this Court stated in *Parr (Supra.)*, at Page 1290, "Therefore, only if the mailings were a part of the execution of the fraud, or as we said in *Pereira v. United States*, 98 L. Ed. 435, 444, 347 U.S. 1, 8, 74 S. Ct. 358, incident to an essential part of the scheme do they fall within the ban of the federal mail fraud statute."

B. That it must be established beyond reasonable doubt that the letters were mailed or received in the district in which the Indictment was found and as alleged in the Indictment. This was requested in Petitioner's Instruction No. 4. "Use of the mails in the execution of the scheme, like venue, is an essential element which must be proved by competent evidence." *United States v. Browne*, 225 F. 2d 751, 755-756 (7th Cir.); *United States v. Cohen*, 145 F. 2d 82, 89-90 (2nd Cir.); *United States v. Cashin*, 281 F. 2d 669, 674 (2nd Cir.); *United States v. Provoo*, 215 F. 2d 531, 537 (2nd Cir.). "One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it there can be no conviction." *United States v. Jones*, 174 F. 2d 747, 748.

C. That in mail fraud and corporate security fraud, the specific intent to defraud is an essential element. The Court refused to give Defendants' Requested Instructions Nos. 4 and 6 on this. *Federman v. United States,* 36 F. 2d 441 (7th Cir.); *Certiorari Denied,* 281 U.S. 729, 50 S. Ct. 246, 74 L. Ed. 1146; *United States v. Danzer,* 26 F.R.D. 580, 586 (Corporate Security Fraud); *Beck v. U.S.,* 305 F. 2d 595, 599 (10th Cir.); *United States v. Scoblick,* 225 F. 2d 779, 783 (3rd Cir.) (Mail Fraud); *United States v. Vandersee,* 279 F. 2d 176, 179 (3rd Cir.) (Mail Fraud and Corporate Security Fraud); *United States v. Broxmeyer,* 192 F. 2d 230, 232 (2nd Cir.) (Mail Fraud).

As held in *United States v. Rabinowitz,* 327 F. 2d 62, 76-77 (6th Cir.), "In every mail fraud case, there must be a scheme to defraud, representations known by Defendants to be false and some person or persons must have been defrauded . . . The scheme to defraud must have included the intent to do so. *Frank v. U.S.,* 220 F. 2d 559, 565." *Williams v. United States,* 278 F. 2d 535, 537 (9th Cir.) holds "Section 1341 requires a specific intent to defraud."

The only instruction given by the Court in the case at bar concerning specific intent was "You are instructed that fraudulent intent is an essential element of defense under 15 U.S.C. 88 Q and 18 U.S.C. 1341" [R. 4324]. It is apparent that the Court's reference to 15 U.S.C. 88 Q is erroneous (the reference should have been 15 U.S.C. 77 q (a)). Such an instruction could only mislead and

concuse the jury. Such an instruction, without identifying the offenses involved, is meaningless.

D. That the defendant, in order to be guilty, must participate in the scheme with knowledge of the unlawful purpose and help make it succeed. One does not become a member of a scheme by aiding and abetting unless he knows of the scheme. *Alexander v. U.S.*, 95 F. 2d 873, 880 (8th Cir.); *Jones v. U.S.*, 251 F. 2d 288, 293-294 (10th Cir.); *Coates v. U.S.*, 59 F. 2d 173, 174 (9th Cir.); *Russell v. U.S.*, 222 F. 2d 197, 199 (5th Cir.); *United States v. Aqueci*, 310 F. 2d 817, 825 (2nd Cir.). The Court refused Petitioner's Instruction No. 4 regarding this.

E. The Defedant at the time the representations were made knew them to be false. *United States v. Rabinowitz*, 327 F. 2d 62, 76-77 (6th Cir.), states "Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be guilty." *Walters v. U.S.*, 256 F. 2d 840, 843 (9th Cir.); *Harris v. U.S.*, 261 F. 2d 792, 795-796 (9th Cir.); *Irwin v. United States*, 338 F. 2d 770, 773 (9th Cir.). The Court refused Petitioner's Instruction No. 6 regarding this. Further, the Court did not instruct that the good faith of the Defendants in making representations is a complete defense to a charge of using the mails to defraud. Petitioner requested this in Instruction No. 6. *Harris v. U.S.*, 261 F. 2d 792, 796 (9th Cir.); *Durland v. United States*, 161 U.S. 306, 313, 16 S. Ct. 508, 511, 40 L. Ed. 709; *Scott v. U.S.*, 263 F. 2d 398, 402 (5th Cir.).

Perkins v. United States, 315 F. 2d 120, 124 (9th Cir.) holds, "It is reversible error for the trial court to refuse, on request, to instruct as to defendant's theory of the case, where the record contains evidence in support for the theory." Further, if the refusal affects substantial rights of the defendant, it may be noted under Rule 52(b), though no exception is taken. *Bird City Exchange v. U.S.,* 338 F. 2d 790, 792 (10th Cir.).

F. The Court did not instruct that unless the scheme to defraud existed prior to the dates of the mailings, such mailings could not constitute a misuse of the mails. *Hass v. U.S.,* 93 F. 2d 427, 435 (8th Cir.); *Gammon v. U.S.,* 12 F. 2d 226, 228 (8th Cir.), states: "Since it was indispensable to a lawful conviction that the fraudulent scheme should have been proved to have been devised prior to the alleged use of the mails to carry it into effect . . ."

G. That each element of the substantive crimes charged must be established beyond a reasonable doubt in order to find the defendants guilty. Petitioner requested this charge in Requested Instruction No. 4 [R. 4347-4348]. The failure so to charge, directly or in substance is reversible error even though not requested. *Johnson v. U.S.,* 244 F. 2d 781, 782 (D.C. Cir.); *Barry v. U.S.,* 287 F. 2d 340, 341 This Court has held in *Holland v. United States;* 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150, 166, that "The Government must prove every element of the offense beyond a reasonable doubt . . ."

H. The Court erred in failing to give Petitioner's Instructions 6 and 21 that a scheme to defraud should not be inferred from the fact that a business fails and that mere puffing and high pressure salesmanship do not constitute fraud. *Scott v. U.S.*, 263 F. 2d 398, 401-402 (5th Cir.); *Gold v. U.S.*, 36 F. 2d 16, 32 (8th Cir.).

I. That if the fraudulent act was completed and the investor's money obtained before the mails were used, there is no violation of 18 U.S.C. 1341. The Court refused Petitioner's Instruction No. 4 regarding this. *United States v. Carruthers,* 152 F. 2d 512, 515 (7th Cir.); *Kann v. U.S.*, 323 U.S. 88, 89 L. Ed. 88, 65 S. Ct. 148 (1944); *Parr v. U.S.*, 363 U.S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171, 1291 (1960). This instruction was particularly applicable to Counts Two, Eight and Nine of the Indictment in that the jury could well have found that the moneys had been received and the fraudulent acts completed prior to the use of the mails.

In a criminal case, the trial court should instruct the jury on all of the essential questions of law involved in the case whether requested or not. *Kreiner v. U.S.*, 11 F. 2d 722, 731; *Morris v. U.S.*, 156 F. 2d 525, 527; *United States v. Noble,* 155 F. 2d 315, 316-317. In addition, when the error is so fundamental as not to submit to the jury the essential ingredients of the offenses charged, the appellate court may take note of it on its own motion. *Screws v. U.S.*, 325 U.S. 91, 107; 89 L. Ed. 1495; 65 S. Ct. 1013, 1038. It has consistently been held that the omission to instruct the jury concerning the essential elements of the offenses

charged is plain error within Rule 52(b) Federal Rules of Criminal Procedure, requiring reversal even if the point is not raised below. *Screws v. U.S.*, 325 U.S. 91, 107, 89 L. Ed. 1495, 65 S. Ct. 1031; *United States v. Levy*, 153 F. 2d 995, 998-999; *Williams v. U.S.*, 131 F. 2d 21, 22-23.

> "In a criminal case, the defendant is entitled to have the jury instructed on all of the elements that must be proved to establish the crime charged. . . . But the omission to charge an element is plain error. See Rule 52 (b), requiring reversal even if the point was not raised below. . . . In a criminal case, a court should instruct on all essential questions of law involved in the case whether requested or not." *United States v. Massiah*, 307 F. 2d 62, 70-71 (2nd Cir.).

And as stated in *United States v. Hutchison*, 338 F. 2d 991 (4th Cir.):

> "This court cannot and will not affirm a conviction by the jury unless the District Court instructed as to the elements of the offense charged in the Indictment, whether requested or not." See *Morris v. U.S.*, 156 F. 2d 525, 527 (9th Cir.) and *Kreiner v. U.S.*, 11 F. 2d 722, 731 (2nd Cir.), *Cert. Denied*, 271 U.S. 688, 46 S. Ct. 639, 70 L. Ed. 1152.

The following elements of conspiracy (18 U.S.C. 371) were entirely omitted by the Trial Court in its jury instructions.

A. At no time during the trial did the Court instruct the jury not to consider the acts and declarations of co-defendants unless the jury found a

conspiracy to exist. This instruction was only given after the jury had retired. Testimony concerning these acts and declarations was allowed over Petitioner's objections. The Court refused Petitioner's Requested Instruction No. 14 concerning this. [R. 837-838, 1074, 1071, 1069, 952, 1272-1273, 1241, 1343, 1347, 1375, 3457]. *Panci v. United States,* 256 F. 2d 308, 311 (5th Cir.); *Paoli v. U.S.,* 1 L. Ed. 2d 278, 352 U.S. 232, 77 S. Ct. 294; *Donaldson v. U.S.,* 248 F. 2d 364, 366 (9th Cir.); *United States v. Wortman,* 326 F. 2d 717, 722 (7th Cir.). As this Court stated in *Lutwak v. U.S.,* 97 L. Ed. 593, 604, 334 U.S. 604, 607, 73 S. Ct. 481, 489, "The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only."

B. Not to consider Exhibits against any defendant not connected therewith until and unless they find a conspiracy to exist between the defendants. *Getchell v. U.S.,* 282 F. 2d 681, 683 (5th Cir.). These Exhibits were admitted into evidence over Petitioner's objection [R. 760-761, 776, 847, 875, 1365-1366, 2903]. It should be observed that all acts, declarations and Exhibits were admitted against all defendants subject to being connected up. [R. 775-776, 1074, 1425-1426, 1873]. To further aggravate the situation some Exhibits were read to the jury to read during the trial over Petitioner's objection [R. 3289-3290].

C. The Court did not instruct that the jury could only consider declarations of the co-conspirators that were made during the course and in furtherance of the conspiracy. *Logan v. U.S.*, 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617; *Garcia v. U.S.*, 315 F. 2d 679, 681. This was requested in Petitioner's Instruction No. 14 [R. 4339]. *Paoli v. U.S.*, 352 U.S. 232, 1 L. Ed. 2d 278, 283, 77 S. Ct. 294. As stated in *Lutwak v. U.S.*, 334 U.S. 604, 617, 73 S. Ct. 481, 489, 97 L. Ed. 593, 603, "But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy.

D. The Court did not instruct that a conspiracy differs from a scheme, in that being an agreement, the parties must have agreed upon all elements, including use of the mails. *United States v. Cohen*, 145 F. 2d 82, 91. "The essence of the conspiracy charge is an agreement to use the mails to defraud." *Pereira v. U.S.*, 347 U.S. 1, 98 L. Ed. 435, 74 S. Ct. 358.

E. The Court did not outline the elements of the substantive offenses that were the object of the conspiracy nor did the Court instruct that knowledge of the substantive crime is a vital element in the guilt of a conspirator. *United States v. Pincourt*, 159 F. 2d 917, 920 (3rd Cir.)

2. Did the Trial Court Commit Reversible Error in the Giving of Erroneous Jury Instructions?

Petitioner respectfully submits that the Honorable Trial Court gave the following erroneous jury instructions.

A. In instructing on corporate security fraud, the Court stated:

> "the promises and representations made to those who loaned the money and obtained notes was that the notes were for one year and then they might be renewed if the so-called investor desired to have them renewed, and that the interest should be paid monthly, and that the interest would be paid . . . the notes were guaranteed, that is, there is some testimony to that effect, and otherwise they were encouraged to make the investment." [R. 4294, line 25, to 4295, line 11].
>
> "So based upon the circumstances the Grand Jury indicted these defendants saying that the Postal laws had been violated." [R. 4295, lines 17-20].

The effect of this charge is to tell the Jury that these statements were false when in fact they were true, *i.e.*, the notes were for one year; were renewed by Mr. Ver Pault (Count Seven) and Mr. Lyman (Count Four) at the end of one year [R. 2133-2134, 2173-2175]; interest was paid monthly and the notes were guaranteed by an assignment of accounts receivable [Govt. Ex. 57-H, R. 1344, 1388-1389]. Further, this effectively withdrew from the Jury its determination as to whether in fact these statements were true or false. Such an

instruction which assumes a fact in issue is prejudicially erroneous. *Lyons v. United States,* 325 F. 2d 370, 375 (9th Cir.); *Roe v. United States,* 287 F. 2d 435, 440 (5th Cir.).

B. The Court further instructed:

"I may say to you that these notes were security within the purview of the law, so I declare that as a matter of law that they were security within the purview of the law."

"I may say to you that these notes were security within the purview of the law, so I declare that as a matter of law that they were security within the purview of the law." [R. 4295-4296].

This withdrew from the jury its determination as to whether or not the notes were securities within the purview of the statutes charged in the Indictment. That this is clearly a question of fact for the jury is set forth in *Farrell v. United States,* 321 F. 2d 409, 415-417 (9th Cir.). In *Roe v. United States,* 287 F. 2d 435 (5th Cir.), the Trial Court instructed as a matter of law that oil leases were "securities". In reversing. the Court said ". . . No fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our Federal System, the Trial Court may never instruct a verdict either in whole or in part". Page 440. The court refused Petitioner's Requested Instruction No. 4 as to the definition of securities.

C. The Court also instructed:

"In the first place there is no issue but the corporation was formed, no issue as I gather

. . . . no controversy but that these notes were issued, and that purchasers who testified here put up their money and the company received the money. There is no question about that." [R. 4297, lines 5-12].

There was an issue as to the forming of the corporation and issuing of notes, and Petitioner's connection therewith, as there was no evidence identifying any Defendant's signature on any document in evidence. Next, this statement was not applicable to the conspiracy Count as CFC was incorporated on November 19, 1958, and the Indictment alleges the conspiracy was formed prior to November 19, 1959 [Govt. Ex. 2]. The Court did not give the jury an instruction so limiting this statement. A jury instruction that assumes an element of the offense charged has been proved is plain error. *Barnes v. U.S.*, 341 F. 2d 649, 650-651 (5th Cir.).

D. In instructing on mail fraud and corporate securities fraud, the Court said:

"The sole question for you to determine when you go to your Jury room upon this Indictment . . . . the first question you ask yourselves is did these defendants or any of them devise a scheme or an artifice to defraud by false pretenses and false and fraudulent representations and promises. That is the first question that will confront you when you go to the Jury room, and then if you determine that there was a scheme to defraud then your next question is . . . Who devised that scheme? Who participated in it? That would be your next question. And then if

you find there was a scheme to defraud and that whoever participated if they did participate in the scheme to defraud then the question before you would be . . . Should we find them guilty or should we find them not guilty? And of course if they did devise a scheme to defraud then they would be guilty." [R. 4297, line 13, to 4298, line 13].

"Now then if you should find and believe from the evidence in this case that these defendants on or about the 19th or on or before the 19th of November, 1958, or at any other time within three years before the filing of this Indictment, and the Indictment was filed in June . . . sometime in June of 1961; if they devised a scheme or artifice to defraud by false pretenses and false representations and promises, and that they obtained money as a result of that scheme or alleged artifice to defraud, then it would be your duty to return a verdict of guilty on such of them as you may believe is guilty of devising a scheme to defraud and using the mails if you find and believe from the evidence that the mails were used in furtherance of the alleged scheme to defraud." [R. 4315, line 25, to 4316, line 20].

"And, of course, if they did devise a scheme to defraud, then they would be guilty." [R. 4298, lines 11-13].

Defendants excepted to these instructions [R. 4342-4343, 4338]. These instructions completely omitted the essential elements of mail and corporate security fraud set forth under Point 1 (A), (B), (C), (D), (E), (F) and (I) *(supra.)*.

E. "He may not be in at the beginning of the conspiracy, and yet if he enters the conspiracy he is responsible for all of those who are in the conspiracy and everything that has gone before, and for everything that goes afterwards." [R. 4311, lines 12-17].

> "Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons, and then if you find two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible." [R. 4312, line 16, to 4313, line 9].

Defendants excepted to this charge [R. 4344, 4339]. The Court's statement that if the Defendant knew of a conspiracy, makes him responsible for all acts both before and after is completely erroneous in three respects. First, mere knowledge of a conspiracy is insufficient unless the Defendants knowing the purpose agree to enter into and participate in the conspiracy and the committing of an overt act in furtherance thereof. In addition, one does not become a party to a conspiracy by

aiding and abetting it, unless he knows of the conspiracy and thereafter wilfully and knowingly participates therein. "A conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States,* 360 U.S. 672, 678, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d 1503. *McManahan v. United States,* 327 F. 2d 21, 25 (10th Cir.); *Jones v. United States,* 251 F. 2d 288, 293-294 (10th Cir.); *Marino v. United States,* 91 F. 2d 691, 696 (9th Cir.); *Coates v. United States,* 59 F. 2d 173, 174 (9th Cir.); *Chavez v. United States,* 275 F. 2d 813, 817 (9th Cir.); *United States v. Crimmins,* 123 F. 2d 271, 273 (2nd Cir.); *Direct Sales Co. v. United States,* 319 U.S. 703, 87 L. Ed. 1674, 63 S. Ct. 1265. As stated in *United States v. Horton,* 328 F. 2d 132, 134 (3rd Cir.), "Since there was no evidence of Edgar's association with a purpose to further or accomplish the definitive objective of the alleged conspiracy, his motion for acquittal on that count should have been granted and such acquittal must now be ordered." Second, a conspirator is not responsible for any acts of his co-conspirators after his withdrawal from the conspiracy. *United States v. Russano,* 257 F. 2d 712, 715-716 (2nd Cir.); *United States v. Cohen,* 145 F. 2d 82, 90 (2nd Cir.). *Van Riper v. United States* 13 F. 2d 961, 967 (2nd Cir.). Third, a conspirator is liable only for those acts and declarations of his co-conspirators that are in furtherance of the conspiracy. *Krulewitch v. U.S.,* 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716; *Pinkerton v. U.S.,* 328

U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, Petitioner's Requested Instruction No. 14 regarding this was refused by the Court.

Further, this is not a correct statement of the law in the absence of the specific instruction that was given in *Pinkerton v. U.S.*, 90 L. Ed. 1489, 328 U.S. 640, 66 S. Ct. 1180. As stated in *Pereira v. United States,* 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435, 445, "The Pinkerton case is inapplicable here since the jury was not instructed in terms of that theory."

Nye and Nissen v. U.S., 69 S. Ct. 766, 93 L. Ed. 919, 336 U.S. 613, distinguished *Pinkerton* by stating that *Pinkerton* holds that a conspirator could be held guilty of a substantive offense, even though he did no more than join the conspiracy, provided the substantive offense was committed in furtherance of the conspiracy and as a part of it. However, a verdict on that theory requires submission of those fact issues to the jury.

Further, in *Pinkerton,* the jury was instructed that in order to supply the lack of direct evidence of participation in the substantive offenses, the jury could regard their finding, if there be one, that a conspiracy existed as sufficient to support a conviction on those counts, but it could do so only provided those acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy. If they were not so instructed, the *Pinkerton* doctrine is inapplicable. It is only the relevant standards to be applied to the evidence, when the jury has been properly instructed as to

that a basis exists for determining whether the evidence is sufficient to support the verdict.

Further, the instruction given in *Pinkerton* was needed to inform the jury of the conditions under which they might use a finding of which the defendants were guilty of conspiracy as circumstantial evidence of guilt of the substantive crimes. It cannot be assumed, in the absence of such an instruction, that the acts referred to in the substantive counts were acts in furtherance of the conspiracy.

In addition, without the instruction it cannot be assumed that the acts constituting the conspiracy were found by the jury to be acts aiding and abetting the substantive offenses.

In the case at bar the *Pinkerton* instruction was not given nor was an instruction given on aiding and abetting.

F. "Now it is charged here that the overt acts a number of them that it was an overt act when the corporation was formed if a conspiracy was arranged. One person can devise a scheme or an artifice to defraud . . . and that it is an overt act when the corporation was formed, and it says an overt act, when the securities were issued, and when certain persons were sold notes, that those were all overt acts." [R. 4314, line 25, to 4315, line 10].

Defendants excepted to this charge [R. 4339]. This instruction is erroneous in two respects. First, the overt act must be committed after the formation of the conspiracy. As heretofore stated, the

incorporation of CFC on November 19, 1958, could not be an overt act as it was done over a year prior to the formation of the alleged conspiracy November 19, 1959 (as alleged in Count Ten of the Indictment) nor could the overt acts alleged in Counts One and Seven, for the same reason. *Marino v. United States,* 91 F. 2d 691, 695 (9th Cir.); *Schnautz v. United States,* 263 F. 2d 525, 527 (5th Cir.); 18 U.S.C. 371. Second, the jury was not instructed that the overt act must be in furtherance and to accomplish the purpose of the conspiracy. *Hansen v. United States,* 326 F. 2d 152, 156 (9th Cir.); *Chavez v. United States,* 275 F. 2d 813, 817 (9th Cir.). The Court refused Petitioner's Requested Instructions Nos. 15 and 16 regarding this. Further, though the instruction related to the conspiracy Count, the statement "one person can devise a scheme or artifice to defraud" could only confuse the jury.

The above quoted jury instruction is also erroneous in that it did not inform the jury that the overt act must be committed by a person who was a party to the conspiracy. The Court refused Petitioner's Requested Instruction No. 15 which contained such a statement. *Hansen v. U.S.,* 326 F. 2d 152, at 156, states "The short answer is that the jury was also instructed that to satisfy the statute the over act must be committed in furtherance of the object of the conspiracy and by a person who was a party to it." *Yates v. U.S.,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

3. Did the Trial Court Commit Reversible Error in Giving Conflicting Jury Instructions Concerning Conspiracy, Mail Fraud and Corporate Security Fraud. And, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Sixth Circuit in Smith v. United States, 230 F. 2d 935, and With the Fifth Circuit in Clifton v. United States, 341 F. 2d 649, 650-651, and of This Court in Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350.

Petitioner respectfully submits that the Honorable Trial Court gave the following inconsistent and conflicting jury instructions.

A. In connection with the conspiracy charge the Court gave three jury instructions with the last instruction being given after the jury had retired and then requested further instructions. The first instruction was as follows:

> "And so the law of conspiracy is that one may not participate in all of the designs of the conspiracy, may not be familiar with all of those who were in the conspiracy.
>
> He may not be in at the beginning of the conspiracy, and yet if he enters the conspiracy, he is responsible for all of those who are in the conspiracy and everthing that has gone before, and for everything that goes afterwards.
>
> He can't get out of a conspiracy until its object is completely satisfied . . . expires . . . unless he retires from the conspiracy by some affirmative act which shows he is out so the pub-

lic will know that he is no longer connected with the conspiracy.

Now in this case if you find and believe from the evidence in this case that more than one person devised this scheme . . . this alleged scheme or artifice to defraud then you from that time forward if you think that two or more persons did within the definition of a conspiracy, that it is an agreement either expressed or implied on the part of two or more persons to do an unlawful thing, then you may say that there was a conspiracy and that it takes the place . . . it stands up as a conspiracy in the devising a scheme to defraud if two or more persons do it, that is, you may find a conspiracy.

Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible.

It is kind of a partnership in crime.

And as you know in partnerships each partner is responsible for what the other one does

or what he says. So if you should find . . . And now again there is another count in the indictment saying that these defendants not only formed a conspiracy but . . . I mean that they formed a conspiracy to violate the Statutes that I have mentioned, that is, the law which forbids the transportation of securities from one state to another, and where a scheme or device has been formed to defraud by false pretenses or false and fraudulent representations, or promises, and the law forbids the use of the mails, so that if there was a conspiracy to violate these Statutes . . . if they presume . . . and everyone is presumed to know the law, and if they formed a conspiracy to violate these Statutes then Congress said that that is a violation of the law, that two or more persons cannot conspire to violate a Federal Statute without subjecting themselves to penalties." [R. 4311, line 7, to 4314, line 12].

This instruction omitted the essential elements of (1) Defendants knowingly and wilfully joined the conspiracy, (2) One of the Defendants knowingly committed an overt act in furtherance of the conspiracy, (3) The specific intent to defraud and (4) That the jury must determine the issue as to the conspiracy membership of a particular defendant only from evidence as to his statements, conduct and acts. *Paoli v. U.S.*, 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294. This last element was also omitted from the second jury instruction concerning conspiracy which was as follows:

"'A conspiracy is defined as a culmination of two or more persons by concerted action to

accomplish a criminal or an unlawful purpose, or some purpose not in itself unlawful or criminal by criminal or unlawful means.

'In order to establish the defense of a conspiracy as charged it is necessary, first, the conspiracy as described is formed and existing at or about November 19, 1959;

'Second, that each of the defendants knowingly and wilfully became a member of the conspiracy;

'Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the times and places alleged;

'Fourth, that the accused while a member of the conspiracy had the specific intent to defraud investors in violation of the Corporation's Security Act and Mail Fraud Act;

'and, fifth, that such overt acts were committed in furtherance of some object or purpose of the conspiracy as charged.

'In considering whether or not a particular defendant was a member of the conspiracy he must do so without regard to and independently of the acts or statements of any other people.

'In other words, you must determine the issuance to conspiracy membership, particularly defendant only from any evidence as to his or her statements, conduct, or acts.'

I don't think I shall give that part of the instruction because he would be bound by the acts of others." [R. 4328, line 21, to 4330, line 12].

This second instruction contained a proper charge as to the requirement of a specific intent to defraud but that the first and third instruction contained no such charge to the jury. The third instruction on conspiracy also omitted any reference to the requirement of the commission of an overt act in furtherance of the conspiracy. The third instruction to the jury was as follows:

" 'One may become a member of a conspiracy without full knowledge of all the details of the conspiracy.

'On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

'Before a Jury may find that a defendant, any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

'To participate knowingly and willfully means to participate voluntarily and understandingly and with the specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done; that is to say, to participate with bad purpose either to disobey or to disregard the law.

So if a defendant, or any other person, with understanding of the unlawful character of a

plan, intentionally encourages, advises, or assists for the purpose of furthering the understanding or scheme, he thereby becomes a knowing and willful participant—a conspirator.

'One who knowingly and willfully joins an existing conspiracy is charged with the same resonponsibility as if he had been one of the instigators of the conspiracy.

'In determining whether or not a defendant, or any other person, was a member of a conspiracy, the Jury are not to consider what others may have said or done.

'That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowlingly done, and statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and furtherance of an object or purpose of the conspiracy.' " [R. 4403, line 12, to 4406, line 3].

This Court held in *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350, . . . "A conviction ought not to rest on an

equivocal direction to the jury." As stated in *Smith v. United States,* 230 F. 2d 935, 939 (6th Cir.):

> "When the court gives inconsistent instructions on a material issue, this violates the principle that the instructions must not mislead the jury and therefore must be consistent and harmonious. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it." See also *Clifton v. United States,* 341 F. 2d 649, 650-651 (5th Cir.).

4. Was It Reversible Error for the Trial Court to Admit Testimony Concerning Petitioner's Buying a Hi-Fi Set, Under an Assumed Name, and Giving a False Credit Reference in Connection Therewith, When This Alleged Incident Had No Connection Whatsoever With Any of the Charges in the Within Case?

At the earliest appropriate time during the trial, counsel for Petitioner advised the Court that the Indictment improperly charged Petitioner with using an alias, as his name had been legally changed on July 11, 1957, by Court Order from Robert B. Schoonmaker to Robert B. Roberts [Deft. Roberts' Ex. A, R. 63-67, 4051]. The Court, prosecutor and Petitioner's counsel then agreed that no further reference would be made to the alias. Later the Court stated in the presence of the jury:

> ". . . but it is agreed that that alias got [sic] out of the case, so that the question is do you know Robert B. Roberts? . . ." [R. 110].

Notwithstanding the ruling of the Court, a prosecution witness was allowed to testify that Defendant

Hogue told her that Petitioner used the name of Schoonmaker in purchasing a Hi-Fi set for his wife [R. 1410-1411]. Petitioner's objection and motion to strike on the grounds that it was hearsay and related to a collateral matter were overruled [R. 1410-1411, 1412, 1414, 4030-4034]. Not only did this incident involve a purely personal transaction, but it had no bearing whatsoever on any charge against Petitioner, who in dealing with customers of CFC always used the name of Petitioner. In addition, the jury could infer that Petitioner was attempting to conceal his true identity in this collateral transaction which was also improper and prejudicial. *Fairbanks v. United States,* 226 F. 2d 251, 253 (D.C. Cir.). This error was compounded by the prosecuting attorney in his final argument to the jury when he stated:

> 'But once you change your name you have to use the new one. You can't now use Shoemaker [sic] and Roberts. You can't use both of them.
>
> He changed his name. So what? When he went down to buy a Hi-Fi set he used the name of Shoemaker [sic]. He was not legally entitled to that name any more, not any more." [R. 4232, lines 1-9].

Such obvious misconduct by the prosecuting attorney, after agreeing that there would be no reference to Petitioner's alias, could not but prejudice the accused's rights. A prosecuting attorney has a double burden—to conduct the Government case zealously and the obligation to try the case fairly and with due regard to the rights of the accused. This was not done in the case at bar. *Dugan Drug Stores, Inc. v. United States,* 326 F. 2d 835, 837 (5th Cir.).

5. **Was It Reversible Error for the Trial Court to Send a Copy of the Indictment to the Jury, Over Objection, Without a Cautionary Instruction With Reference to the Unproven Charge of Petitioner's Use of an Alias Alleged in the Indictment and Without a Further Cautionary Instruction That the Unproven Allegations in the Indictment Should Not Be Considered at All by the Jury and Had Been Withdrawn? and, Does the Decision of the Court of Appeals in Respect of That Question in the Instant Cause Conflict With the Decisions of the United States Courts of Appeal for the Third Circuit in D'Allessandro v. United States, 90 F. 2d 640, 641; the Second Circuit in United States v. Monroe, 164 F. 2d 471; and the Second Circuit in United States v. Grayson, 166 F. 2d 863?**

The Indictment contained over four pages reciting the alleged fraudulent acts of the Defendants, of which not less than sixteen of the alleged acts were unproven, and contained the names of 84 persons allegedly defrauded who did not testify during the trial and concerning which there was no evidence introduced. It is conceded that the sending of an Indictment to the jury is discretionary with the Court. However, in this case the Court was under the mistaken view that he had no choice but to send the Indictment to the jury. On three occasions the Trial Court stated in substance, "If the jury asks for the Indictment, I have to give it to them." [R. 4337, 4354, 4356]. Under the ruling of *Group Indemnity Co. v. Stringer,* 190 F. 2d 1017 (5th Cir.) this would constitute a failure of and refusal to exercise discretion.

When the Court indicated it intended to send a copy of the Indictment to the jury room, Petitioner objected unless the reference to the alias was deleted [R. 4336-4337, 4354]. In addition, all Defendants objected that the Indictment should not go to the jury room and, if it did, a limiting instruction be given by the Court to the jury to the effect that in order to find Defendants guilty, the prosecution must prove all of the allegations in the Indictment. There was no ruling on these objections and therefore they were denied by implication [R. 4337-4338, 4355-4356]. The Indictment, as originally returned by the Grand Jury, was sent to the jury room with no such limiting instruction and with the reference to Petitioner's alias contained therein [R. 4376]. *United States v. Helwig,* 7 F.R.D. 187 (D.C.W.D. Penn.); *Lefco v. United States,* 74 F. 2d 66, 70 (3rd Cir.); and *D'Allessandro v. United States,* 90 F. 2d 640, 641 (3rd Cir.), all point out that the practice of loading the Indictment with an alias is improper and inherently prejudicial and that the Court should instruct the jury that the Defendant's name was legally changed and therefore does not connote criminality. This the Court did not do. As stated in *United States v. Monroe,* 164 F. 2d 471, 476-477 (2nd Cir.): "We agree that the practice of loading indictments with unnecessary aliases is inherently prejudicial." *D'Allessandro v. United States* (3rd Cir.), 90 F. 2d 640, 641, states:

> ". . . The judge then called in the jury, gave them the indictment, and explained to them that no connotation of criminality could attach to the term, 'alias,' and that appellant had in fact legally changed his name."

See also: *United States v. Grayson,* 166 F. 2d 863, 867 (2nd Cir.), which states:

> "We can see no justification for the use of the alias, and the practice has been several times condemned. No issue could come up as to Grayson's identity, and an alias—even a single alias—can serve no purpose but to arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity."

Nor did the Court instruct the jury that the unproven charges in the Indictment had been withdrawn from the case. *Cody v. United States,* 73 F. 2d 180, 183-184 (9th Cir.).

6. Was the Petitioner Deprived of Due Process of Law and His Right to Trial by an Impartial Jury When Denied One Additional Peremptory Challenge to a Juror Who Stated That She Felt a Defendant Should Come Forward With Evidence in a Criminal Trial?

Rule 24(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides in substance that if two or more defendants are tried jointly, they are entitled to ten joint peremptory jury challenges and to additional separate peremptory challenges as advisable in the Court's discretion. Prior to the *voir dire* of the jury panel, Defendants requested additional separate challenges which the Court refused [R. 67-71].

Each prospective juror was carefully questioned concerning his attitude if a defendant did not take the stand in his own defense. As an example see that of prospective juror Ellis [R. 311].

After Defendants' ten joint peremptory challenges were exhausted, Mrs. Lewis, a prospective juror, stated that she felt a defendant should come forward with evidence in a criminal trial. Defendants' motion to challenge for cause was denied [R. 601]. At this time Defendants again requested additional peremptory challenges and again the Court denied this request [R. 604]. Inasmuch as no Defendant testified at the trial, the prejudicial effect and abuse of discretion is manifest. Further, in view of the number of Counts and Defendants involved, the time and difficulty counsel had in obtaining a jury, additional challenges were necessary to assure the Defendants of a fair trial by an impartial jury. This error was further aggravated when the Court instructed the jury:

> "The Grand Jury returned an Indictment, and the Grand Jury, of course, its thought was unless there was an answer to it. . . . They should be put up on trial . . . and unless they answered they should be convicted." [R. 4299, lines 1-6].

The privilege against self-incrimination forbids the Court from placing the defendant in a position where he must testify in order to avoid an adverse inference by the jury or by an official suggestion that he take the stand in his defense. The Court, by the above quoted statement to the jury, placed the Defendants in just that position. *Redfield v. United States of America,* 315 F. 2d 76, 80 (9th Cir.); *De Luna v. United States of America,* 308 F. 2d 140, 154 (5th Cir.).

In *United States of America v. Fujimoto,* 107 F. Supp. 865 (U.S.D.C.D. Hawaii) it was held that the record warranted, in a conspiracy prosecution, the

granting of one additional peremptory challenge to each of seven defendants in order to insure the selection of a fair and impartial jury (pp. 867-868). Certainly in the instant case, when a juror believed a defendant should testify in his own behalf, additional challenges were not only warranted, but required to assure the Defendants of a fair trial.

7. Did the Trial Court Commit Reversible Error in Permitting Declarations of a Co-Conspirator That Were Not in Furtherance of the Conspiracy, Was Merely a Narrative Statement, Had No Connection With the Charges in the Indictment and Were Highly Prejudicial. And, Does That Conflict With the Rulings of This Court in Lutwak v. United States, 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481, and Paoli v. United States, 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294?

The Court permitted declarations of an alleged co-conspirator that were not in furtherance of the conspiracy, nor connected with the charges in the Indictment, and were prejudicial. Mrs. Hightower testified, over objection, that Defendant Hogue told her that Petitioner was using the name Schoonmaker in buying a Hi-Fi set for his wife and to tell the seller that Petitioner had good credit when in fact he did not [R. 1411, 1413-1414]. She further testified over objection that Norman Gradsky had taken $1500.00 from CFC and lost it at the dog races [R. 1425]. Again she testified that Defendant Hogue told her that CFC didn't own the land that was reflected on the financial statement [R. 1424]. That such inflammatory and prejudicial testimony, not in furtherance of the conspiracy and merely in narrative form is inadmissi-

ble, is set forth in *Lutwak v. United States,* 97 L. Ed. 593, 344 U.S. 604, 73 S. Ct. 481; *United States v. Carminati,* 247 F. 2d 640, 644 (2nd Cir.); *Van Riper v. United States,* 13 F. 2d 961, 967 (2nd Cir.); *Paoli v. United States,* 1 L. Ed. 2d 278, 283, 352 U.S. 232, 77 S. Ct. 294; *Garcia v United States,* 315 F. 2d 679, 681 (5th Cir.); *Gay v. United States,* 322 F. 2d 208, 209; *Logan v. United States,* 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617 (1892); *United States v. Wortman,* 236 F. 2d 717, 725 (7th Cir.).

Conclusion.

A Writ of Certiorari to the Court of Appeals to the Fifth Circuit should be issued, to the end that so much of the Court's Judgment as affirmed the Judgment of the District Court may be reviewed.

Respectfully submitted,

THOMAS F. CALL,
Attorney for Petitioner
Robert B. Roberts.

APPENDIX A.

Opinion of the United States Court of Appeals for the Fifth Circuit.

In the United States Court of Appeals For the Fifth Circuit

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, versus United States of America, Appellee. No. 19974.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before Tuttle, Chief Judge, Jones, Circuit Judge, and Grooms, District Judge.

Tuttle, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q)(a), and the Mail Fraud Statute, 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be dealt with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false, their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel v. U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the

trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.
>
> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . . and unless they answered they should be convicted.
>
> "And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez v. United States,* 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial

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[1]This statute provides in part as follows: "Whenever on trial for a violation of this subsection the defendant is shown to have had or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the courtroom and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous. It was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.

"On the contrary, they were within their rights in not testifying in the case.

"So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a postal inspector for proper use by the United States. It is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The

[2]It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

government expert, the accountant. Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries. It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States v. Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill v. United States,* 5 Cir., 298 F. 2d 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire,* this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with evidence in this case if he is on trial?" She answered, "I think so." Thereupon the

court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire,* which we seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there is no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec. 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was designed to facilitate proof of business records seem to have been fully met here.

The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll v. United States,* 9 Cir., 1963, 326 F. 2d 72, and *Taylor v. United States,* 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not to be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well established that such books and records are admissible only against corporate offices with access and control thereof, who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company,* but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the

company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a participant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer participation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused

persons. See *Greenhill v. United States,* 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960, to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two four, five, seven and nine must be set aside. Gibbons was an employee of the company for approximately two months—from the end

[3]Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood v. United States,* 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan v. United States,* 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten. The sentences against Schiff on counts one, three, four, five, six, and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

April 9, 1965

Edward W. Wadsworth, Clerk.
Room 405 - 400 Royal St., New Orleans, La. 70130.

Re: No. 19974 - Norman Gradsky, et al vs United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

Edward W. Wadsworth,
Clerk

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APPENDIX C.

Statutes Involved.

15 U.S.C. 77q(a). Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

18 U.S.C. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the

maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 2301

ROBERT GRENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1964

No.

ROBERT GRENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Robert Grene, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court denying rehearing entered on the 9th day of April, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A hereof and the advice to counsel as to the order denying rehearing is found in Appendix B hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37(b)(1)(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of March, 1965, (Appendix A), and thereafter a petition for rehearing was timely filed (Appendix C), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B).

Petition for Extension of Time to File Petition for Writ of Certiorari was granted by an Order executed by The Honorable Hugo L. Black, extending the time for filing said petition for writ of certiorari to and including June 8th, 1965, dated on the 7th day of May, 1965.

QUESTIONS PRESENTED

I

Whether or not the Trial Court abused its discretion to deny a continuance to the Appellant, Robert Grene.

II

Whether or not Appellant Grene was denied assistance of counsel in accordance with the guarantees contained in the United States Constitution by the Trial Court allowing attorneys who had previously stated

that they could not represent the Appellant due to a conflict of interest stand in for the Appellant Grene's court-appointed attorney.

III

Whether or not the Appellant Grene was denied his right of counsel under the guarantees afforded to him under the Constitution of the United States by the Appellant Court, the Fifth Circuit Court of Appeals, appointing as his counsel in such court an attorney who had a definite conflict of interest.

IV

Whether or not the trial court committed reversible error in denying appellants' motion to disqualify the juror Mrs. Lewis for cause and for denying appellants' motion to grant additional peremptory challenges.

V

Whether or not the trial court committed reversible error in its charge to the jury whether the trial court stated as follows: "The Grand Jury returned an Indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on their trial . . . and unless they answer they should be convicted."

VI

Whether or not the trial court and Circuit Court of Appeals for the Fifth Circuit committed reversible error in failing to dismiss and set aside all substantive counts pertaining to the Appellant Robert Grene alleged to have been committed prior to April 8th of

1960, the first date the Government alleges in its Indictment that the Appellant Robert Grene entered into the scheme, and subsequent to July 22nd of 1960, the date which the Indictment alleges that co-defendant George Levine purchased Credit Finance Corporation.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; United States Constitution, Sixth Amendment; Title 15, United States Code Annotated, Section 77q(a); Title 18 United States Code Annotated, Section 1341; Title 18 United States Code Annotated, Section 371; Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Text of the same are set forth in Appendix I hereof.

STATEMENT OF THE CASE

Your Petitioner, Robert Grene, was accused jointly with ten other co-defendants of violating certain laws of the United States. The Indictment contained ten counts. It consisted of thirteen pages. Counts I through V of the Indictment set forth violations of Title 15, U.S.C. 77q(a), (Securities); Counts VI through IX set forth violations of Title 18, U.S.C. 1341, (Mail Fraud), and Count X of the Indictment set forth one count of conspiracy to violate the corporate security and mail fraud laws in violation of Title 18, U.S.C. 371.

The Indictment, other than mentioning Robert Grene for identification purposes, lumping him in with the other co-defendants, charged that co-defendants Gradsky sold their stock in the corporation (Credit Finance Corporation?) to Security Guaranty Company, which company was owned by the defendant Robert Grene, and of which he was president.

Thereafter, Security Guaranty, Incorporated, and the defendant, Robert Grene, would and did operate the corporation (Credit Finance Corporation?) for a certain length of time when it sold all of its stock in the corporation to George Levine.

It is unquestioned by the Indictment and unproven by the evidence that the Appellant Grene had anything to do with Credit Finance Corporation prior to the time that its stock was sold to Security Guaranty corporation, which sale, from the evidence, seems to have occurred on or about April 8th of 1960. It is unquestioned from the evidence that all of the stock of Credit Finance Corporation was sold to George Levine on July 22nd of 1960. Thus, the substantive counts only, Counts IV and V, occurred during the period of your Petitioner's association with Credit Finance by virtue of Credit Finance's ownership by Security Guaranty.

Counts I, III, VI, VII, and VIII occurred prior to Security's acquisition of April 8th of 1960. Counts II and IX occurred subsequent to the date Credit Finance was purchased by co-defendant George Levine.

No evidence of any type showed any relationship or agreements between the Gradskys and Grene, or between Grene and co-defendant Levine.

No evidence showed that any sales personnel acted upon any instructions of your Petitioner to make an unlawful statement to effect any sale. In fact, even in the Counts IV and V the purchaser denied any knowledge of your Petitioner Grene. It is thus apparent that if there was a conspiracy, there were three separate conspiracies and there should have been three separate trials.

Trial of the case was commenced June 11th of 1962. On the morning of that date, the trial judge allowed an attorney who had previously entered his appearance for the Appellant Grene to withdraw from the case. Thereafter, the trial judge requested counsel who were representing other co-defendants if they could represent the Appellant Grene. Such counsel, after consulting with their respective clients, declined to represent the Appellant Grene, because to do so might present a conflict of interest.

Thereafter, the Court assigned counsel to represent your Petitioner Grene who met such court-appointed attorney for the first time at two o'clock on the day the trial commenced. Said court-appointed attorney requested a continuance, which was denied.

On June 13th, of 1962, after the jury was impanelled, but not sworn, said attorney renewed his motion for continuance, which was again denied.

That, thereafter, a jury trial was had, and evidence was presented to the jury, a more complete and thorough statement of the evidence presented to the jury is contained herein in Appendix D. Your Petitioner was found guilty of ten counts, and, after adjudication of guilt, was sentenced to eighteen months on each count, to run *consecutively,* or a total sentence of fifteen years.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A) was entered on the 11th day of March, 1965, and that, thereafter, a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your petitioner should be granted for the reason that the decision of the Fifth Circuit Court of Appeals in the case at bar is in direct conflict with decisions in other jurisdictions and with decisions of this Court. *Powell* v. *Alabama,* 287 U.S. 45; *Turinetti* v. *United States,* 2 F. 2d 15; *Glasser* v. *United States,* 315 U.S. 60.

In the case at bar, on June 11th of 1962, the Court allowed your Petitioner's attorney to withdraw and appointed another attorney to represent your Petitioner. At two p.m., on the same date, the trial began. The appointed attorney made a motion for continuance, which was denied. This motion for a continuance was repeated on June 13th, after the jury was impannelled.

Thus, Petitioner Grene went to trial with a court-appointed attorney, who prior to selecting the jury, did not have an opportunity to discuss the case with his client. The Indictment was a complex one, consisting of ten counts, containing thirteen pages. There can be no question that the Constitutional guarantee contained in the Sixth Amendment is rendered meaningless if counsel does not have time to adequately prepare his case.

It is respectfully submitted that the writ sought by your Petitioner should be granted for the reason that the decision of the Fifth Circuit in the case at bar is in direct conflict with the decision of this Court in *Glasser* v. *United States,* 315 U.S. 60, in that the trial court consistently throughout the trial allowed attorneys other than Grene's court-appointed attorney to

represent Grene when such court-appointed attorney was absent even after such attorneys had indicated prior to the trial that they could not afford Grene representation due to conflict of interest.

This conflict of interest representation did not stop at the Trial Court. The Fifth Circuit Court of Appeals subsequently ordered the counsel of co-defendants Norman Gradsky and B. J. Gradsky to represent your Petitioner Grene in the Court of Appeals. Said co-defendants Gradskys was certainly the principal participant in the scheme, if any.

It is respectfully submitted that the writ sought by your Petitioner Grene should be granted for the reason that the decision of the Fifth Circuit of *Sherwood* v. *United States,* 300 F. 2d 603, is in direct conflict with the order of the Fifth Circuit in the case at bar in denying Petitioner Grene's petition for rehearing without opinion (Appendix B, Appendix C).

In support of this, it is respectfully urged that in said petition for rehearing it was pointed out to the Fifth Circuit Court of Appeals that the Court had in its opinion reversed the trial court because of the fact that three of the appellants, namely, Schiff, Roberts and Gibbons were not employed by the organization in question at the time of the commission of the substantive offenses and for that reason and for that reason alone the Fifth Circuit Court of Appeals set aside the sentences against the defendants Schiff on Counts I, III, IV, V, VI, and VII; against Gibbons, Counts I, II, III, IV, V, VII, VIII, and IX, and against Roberts on Counts I, II, IV, V, VII and IX. However, they allowed the conspiracy count to remain.

As to your Petitioner Grene, they allowed all of the counts to stand, although the evidence is clear that your Petitioner Grene did not join the organization in question until April 8th of 1960, and that he terminated his association due to the sale to co-defendant Levine on July 22nd of 1960. Thus, giving the evidence that was introduced at the trial the greatest possible weight against your Petitioner Grene. It is clear that his participation, if any, was limited to that period of time between April 8th of 1960 and July 22nd of 1960, or a total of 104 days. No evidence of any agreement Gradskys and Grene was introduced. No evidence of any agreement between Grene and co-defendant Levine was introduced. The only substantive counts that occurred during the dates of his so-called association were Counts IV and V. The Government's witnesses in each count denied any knowledge of your Petitioner Grene. It is quite clear that there should have been three trials.

It is apparent to your Petitioner that the law applied with reference to said counts as described herein by the Fifth Circuit Court of Appeals was proper for the Appellants Gibbons, Roberts and Schiff, but not for the Appellant Robert Grene. Your Petitioner is at a loss to see how the law can be applied to one and not equally to another. That the failure to apply the law as to him as was applied to the other defendants, Gibbons, Schiff and Roberts would be a denial of his rights under the Constitution of the United States. Failure of appellate counsel to present the above argument to the Court of Appeals is a further violation of Petitioner's rights guaranteed to him by the Sixth Amendment. *Glasser* v. *United States*, 315 U.S. 60.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A) in deciding the points more fully raised in your Petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix D.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A) in deciding the points more fully raised in the briefs of all of the other petitioners to said Fifth Circuit, all of which are incorporated by reference herein. Your petitioner further requests that all points that might be raised in this court by virtue of briefs filed by other petitioners be adopted as his own in considering this request for a petition for a writ of certiorari in this identical case for that common questions of fact are presented therein.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

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By: JOSEPH W. WYATT
Joseph W. Wyatt

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Florida

(March 11, 1965)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

TUTTLE, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q)(a), and the Mail Fraud Statute 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of

the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be dealt with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he

was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false, their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel* v. *U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, as follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.

"The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . and unless they answered they should be convicted.

"And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez* v. *United States*, 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the court room and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous; it was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was

[1] This statute provides in part as follows: "Whenever on trial for a violation of this subsection, the defendant is shown to have had or to have had the marijuana in his possession, shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.
>
> "On the contrary, they were within their rights in not testifying in the case.
>
> "So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a postal inspector for proper use by the United States. It

is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The government expert, the accountant Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries.

It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States* v. *Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill* v. *United States*, 5 Cir., 298 F. 2d 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire*, this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with

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[2] It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with the evidence in this case if he is on trial?" She answered, "I think so." Thereupon the court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire,* which was seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there is no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec. 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was

designed to facilitate proof of business records seem to have been fully met here. The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll* v. *United States*, 9 Cir., 1963 326 F. 2d 72, and *Taylor* v. *United States*, 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well establshed that such books and records are admissible only against corporate offices with access and control thereof who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company*, but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a par-

ticipant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer participation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused persons. See *Greenhill* v. *United States*, 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending

here, Gibbons, Schiff, and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960, to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two, four, five, seven and nine must be set side. Gibbons was an employee of the company for approximately two months—from the end of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood* v. *United States*, 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan* v. *United States*, 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done

---

[3] Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten. The sentences against Schiff on counts one, three, four, five, six and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B

COURT RULE

Rule 32

Issuance of Mandate

Date of Issuance: The mandate of the court shall issue after twenty-one days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the

court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Petition for Re-Hearing

On March 11, 1965, this Court affirmed the Judgment of the Trial Court herein. The jurisdiction of this Court is invoked pursuant to Rule 29 of the rules of this Court.

As To All Appellants:

1. The Court misconstrued the record as to the availability of the records of SECURITY GUARANTY CORPORATION, in that the Court stated:

> "It is plain that these records were available in the government's possession in Orlando, the place of trial, for most of the the period of the trial—"

The record reflects that trial counsel for the appellant, ROBERT GRENE, examined these records one week prior to trial, and on the day the trial commenced the records had been removed. The Court's statement that there was no showing that the absence of the records prejudiced the appellants is without foundation in that the charts prepared by CALLAHAN (government's exhibits 238-238E) were in part based upon SECURITY GUARANTY CORPORATION.

In addition to the foregoing, the company whose records were secreted, was even named in part of the indictment.

2. The Court failed to consider the Trial Court's and prosecutor's comments about trial counsel.

3. The Court failed to consider the Court's improper use of the charts (government's exhibits 238-238E).

As To The Appellant, ROBERT GRENE:

1. The Court failed to consider the denial of his motion for a continuance because Court-appointed counsel was unfamiliar with the cause.

As To The Appellant, B. J. GRADSKY:

1. That although she received some of the financial benefits of the operation of CREDIT FINANCE CORPORATION, the record lacks any evidence, by inference or otherwise, that she in any way knowingly participated in a scheme or conspiracy to defraud; that by the Securities and Exchange Commission's own admission, the extent of her participation in the activities of the company was to sign documents, probably at the request of her husband.

Conclusion

It is respectfully submitted that this Petition for Rehearing should be granted.

E. David Rosen
Attorney for Appellants,
Norman Gradsky, B. J.
Gradsky and Robert Grene
310 Biscayne Building
19 West Flagler Street
Miami, Florida. 33130

Certificate of Good Faith

I, the undersigned counsel, respectfully certify to this Honorable Court that the foregoing Petition for Re-Hearing is presented in good faith and not for the purpose of delay.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

Norman Gradsky, et al, *Appellants,*

v.

United States of America, *Appellee.*

Appeal From The United States District Court
For The Southern District of Florida

Brief of Appellants Norman Gradsky, B. J. Gradsky and Robert Grene

Statement of the Case

The appellants hereby adopt and incorporate as their own the Introductory Statement and Statement of the

Case, as contained in the brief filed on behalf of the appellant, ROBERT B. ROBERTS (BR pages 1 through 10).

SPECIFICATION OF ERRORS

I.

The Court Erred In Refusing To Excuse Mrs. Lewis As A Judor For Cause And In Refusing To Grant Defendants' Additional Peremptory Challenges.

II.

The Court Erred In Sending A Copy Of The Indictment To The Jury Without Instructing That The Unproven Charges In The Indictment Had Been Withdrawn From The Case, And Sending Other Exhibits To The Jury That Had Not Been Requested.

III.

The Court Erred In Charging The Jury And In Refusing To Charge The Jury As Requested By Defense Counsel.

IV.

Errors Committed By The Court During The Course Of The Trial.

V.

The Court Erred In Denying B. J. Gradsky's Motion For Judgment Of Acquittal.

VI.

It Was Abuse Of Discretion To Deny A Continuance To The Appellant, ROBERT GRENE.

Argument

I.

The Court Erred In Refusing To Excuse Mrs. Lewis As A Juror For Cause And In Refusing To Grant Defendants' Additional Peremptory Challenges.

The appellants hereby adopt as their own the brief of Robert B. Roberts (BR pages 12 and 13) as argument under this Specification of Error.

II.

The Court Erred In Sending A Copy Of The Indictment To The Jury Without Instructing That The Unproven Charges In The Indictment Had Been Withdrawn From The Case, And Sending Other Exhibits To The Jury That Had Not Been Requested.

The appellants hereby adopt as their own that portion of Robert B. Roberts' brief relating to the submission of the Indictment to the Jury without proper limiting instructions (BR pages 15 through 19).

The Jury requested some additional documents. It is apparent from the colloquy between the Court and counsel that requests were subject to interpretation. (R Volume 22, pages 4356 through 4369). Counsel for the defense and the prosecution disagreed as to what was meant by the request. It was decided that during the lunch recess, the Clerk would assemble the material and submit it to counsel for examination before sending them to the Jury (R Volume 22, page 4368). It was later learned that the exhibits were delivered to the Jury contrary to the foregoing (R Volume 22, page 4377).

The Jury requested the "transfer" from Credit Finance Corporation to Credit Realty Corporation containing a forged signature. There was no proof that any document contained a forgery. There was no transfer from Credit

FINANCE CORPORATION to CREDIT REALTY CORPORATION. The District Attorney and the Clerk assumed that the Jury wanted the Certificate of Incorporation of CREDIT REALTY CORPORATION, Government's Exhibit 4.

In addition, the Jury requested signature cards of all bank accounts of "related corporations". Over objection and contrary to the agreement for examination prior to submission, the bank records of INTER CITY FINANCE COMPANY, MAJOR MOTORS, NATIONAL CREDIT CORPORATION and CREDIT REALTY CORPORATION were sent to the Jury room (Government's Exhibit's 201, 202, 204, 205, 206, 207 and 208).

The manner in which these requests were handled was tantamount to the Court telling the Jury that in his opinion these were the exhibits asked for and constituted prejudicial error.

III.

The Court Erred in Charging The Jury And In Refusing To Charge The Jury As Requested By Defense Counsel.

Each of the appellants adopted the requested instructions of ROBERT B. ROBERTS (R Volume 21, page 4112). Each adopted the others' exceptions to the instructions (R Volume 21, page 4112).

The appellants hereby adopt the brief of ROBERT B. ROBERTS as argument hereunder (BR pages 19 through 38).

In addition to the foregoing, the Court instructed the Jury that the appellants were charged with the offense of interstate transportation of promissory notes (R. Volume 22, pages 4291 and 4296). Exception was taken to this charge (R. Volume 22, page 4342). It is error to instruct the Jury on law wholly inapplicable to the case.

The Court correctly stated that the Government had the burden of proving its case to the exclusion of a reasonable

doubt, however, the Court also instructed the Jury that the Grand Jury having returned the indictment found that there was sufficient evidence to convict the defendants if they did not come forward with proof (R Volume 21, page 4299).

It is error to give conflicting instructions, although one is correct and the other incorrect, and it is error to leave with the Jury the impression that it is the burden of the defendant to prove his innocence. *Perez* v. *United States,* 297 F. 2d, 12 (C.A. 5, 1961)

IV.

Errors Committed By The Court During The Course Of The Trial.

The appellants adopt the brief of ROBERT B. ROBERTS as it relates to this Specification of Error (BR pages 38 through 46).

Supplementing subpoint 6, page 42, of ROBERT B. ROBERTS' brief relating to misconduct by the prosecutor and the Court, the following is also submitted:

a. On June 18, 1962, DAVID CLARK, Court-appointed counsel for the appellant, GRENE, filed a Motion to Produce (Docket Entries).

b. The Motion to Produce was denied in open Court on July 10, 1962 (Docket Entries and R Volume 17, page 3412).

c. The fact that CLARK's Motion to Produce was directed to the records of SECURITY GUARANTY CORPORATION was brought out by the United States Attorney (R Volume 21, page 4058).

It was prejudicial misconduct for the prosecutor to argue to the Jury that no such motion had been filed. This was erroneously substantiated by the Court when he agreed with the District Attorney and further stated that he had not

denied any such motion (R Volume 22, pages 4269 and 4270). The prosecutor then argued that defense counsel had impugned the integrity of the Court.

The defendants' Motions for Mistrial were denied (R. Volume 22, pages 4277, 4280 and 4281) and the Court refused to give the Jury any reasonable explanation of the dispute (R. Volume 22, page 4340).

By challenging the integrity, sincerity and honesty of defense counsel, all in the presence of the Jury, the prosecutor and the Court committed reversible error. *Wagner* v. *United States,* 263 F. 2d, 877 (C.A. 5, 1959)

The prosecutor suppressed material evidence.

Threaded throughout the trial was the elusive, but ever present SECURITY GUARANTY CORPORATION. For example:

a. Prospectus and contracts of SECURITY GUARANTY (R Volume 12, pages 2256 through 2299).

b. SECURITY GUARANTY took over CREDIT FINANCE CORPORATION (R. Volume 9, page 1697).

c. CALLAHAN's charts (Exhibits 238-238E) and his testimony (R. Volumes 18, 19 and 20, pages 3435 through 4014).

d. Innumerable other witnesses referring to SECURITY GUARANTY CORPORATION.

The record reflects that defense counsel, CLARK, was examining the records of SECURITY GUARANTY COMPANY when they suddenly became unavailable; hence his Motion to Produce (R Volume 6, page 1039 and Volume 21, pages 4050 through 4056).

After the trial progressed, the imperative need for these records become more apparent. To the dismay and chagrin of the defendants, it was learned that these records were removed to the trunk of the automobile of the Post Office Inspector, FRANCIS, who had earlier been introduced to the Jury as being one of the officials who would assist in the

prosecution (R. Volume 4, page 700). (Little did the defendants think that his assistance would be to secrete material evidence.) This situation was met with complete disdain by the prosecutor and total indifference by the Court (R Volume 19, pages 3782 through 3787 and Volume 20, pages 3899 through 3901).

A prosecutor has the affirmative duty to disclose all the facts, regardless of the consequences. *United States* v. *Zborowski,* 271 F. 2d, 661 (C.A. 2, 1959) In the case of *United States* v. *Consolidated Laundries Corporation,* 291 F. 2d, 563 (C.A. 2, 1961) the Court ruled that the negligent suppression of evidence that might be a benefit to the defense requires a reversal.

The reprehensible action by the United States Attorney was neither an oversight nor a negligent omission, but the deliberate and conscious effort to win without justice. *Berger* v. *United States,* 295 U.S. 78 (1935)

Errors relating to charts.

Over objection of counsel, charts were introduced through Security Exchange Commission Accountant, GEORGE M. CALLAHAN (R Volume 18, pages 3481 through 3502, Exhibits 238-238c). These charts, duplicated and enlarged, were received in to evidence over objection. The blown up charts were placed upon an easel before the Jury.

As this Court said in *Lloyd* v. *United States,* 226 F. 2d, 9 (1955):

> "The use of this type evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a trial by charts, however, impressive, the array produced."

The footnoted conclusionary statements at the bottom (Government's Exhibit 238, the balance sheet) is precisely what this Court meant in the LLOYD case. Not only were the statements conclusionary, but also they contained statements of alleged facts not supported by the record, but as a result of independent investigation by the Security Exchange Commission.

For example, the stock of INVESTORS DEVELOPMENT CORPORATION was eliminated as an asset because:

a. The transfer agent's records (not before the Court) did not reflect stock in the name of CREDIT FINANCE CORPORATION (Footnote D, Government's Exhibit 238).

b. LEONARD GLAZER's letter relating to the stock (not before the Court) (R Volume 19, page 3744).

c. LEO HIRSHMAN's testimony (not in evidence) .(R. Volume 19, page 3749).

Another chart, "Summary of Case Transactions With or For Norman Gradsky, B. J. Gradsky, their family and Related Corporations", (Government's Exhibit 238B) contains no notations as to the source of the information placed on the chart. It was an arbitrary assumption on the part of the agent to include the corporations listed therein as "related corporations". At least one of the corporations, FRED ABLON MOTORS, was never mentioned during the entire trial.

These charts are typical of that which was condemned by LLOYDS vs. UNITED STATES supra. It was an abuse of discretion to permit these charts into evidence and constituted prejudicial error by the trial court.

V.

The Court Erred In Denying B. J. Gradsky's Motion For Judgment Of Acquittal.

In addition to being an authorized signatory on innumerable bank accounts, signing her name on checks and

other documents, and receiving a rug for her home from funds derived from CREDIT FINANCE CORPORATION, the record is void of any knowledge and participation by B. J. GRADSKY.

It appears that on one occasion she was present at a time when MR. GIBBONS and MR. ROBERTS were conducting an interview with a prospective investor. She did not participate in the conversation. The record is vague as to whether or not she overheard the entire conversation (R Volume 11, pages 2227 through 2231). One other witness testified that he spoke to a woman who "looked like Mrs. Gradsky", but when asked if he knew who Mrs. Gradsky is, the witness stated, "No, I only know her from seeing Mrs. Gradsky here and having her pointed out by other people in the lobby." (R Volume 12, page 2362)

It is submitted that the foregoing is insufficient in law to have submitted the case of Mrs. Gradsky to the Jury, and it was error for the trial Court to have denied her Motion for Judgment of Acquittal. (R Volume 21, page 4068)

The appellant, B. J. GRADSKY, hereby adopts the case citations submitted in the brief of ROBERT B. ROBERTS (BR pages 46 through 56).

VI.

It Was Abuse Of Discretion To Deny A Continuance To The Appellant, Robert Grene.

The Docket Entries show that as of October 18, 1961, the appellant, ROBERT GRENE, was represented by DAN CHAPPEL. DAN CHAPPEL'S Motion to Withdraw as GRENE'S counsel was granted on June 11, 1962 (R Volume 1, page 28 through 35). MR. GRENE'S inability to cope with the situation is demonstrated by the colloquy contained in the foregoing pages and by additional conversation with the Court (R Volume 1, pages 59 through 62). On the same

day at approximately ten minutes to 2:00 P.M., DAVID CLARK was notified of his appointment to represent this appellant (R Volume 1, page 88). His Motion for a Continuance was denied (R Volume 1, page 89). From the number of pages intervening, it appears that within another five minutes, the Court commenced empanneling the Jury (R Volume 1, page 97). On June 13, 1962, after the Jury was empanneled, but not sworn, MR. CLARK renewed his Motion for Continuance, which was denied (R Volume 3, pages 604 and 605).

Requiring Court-appointed counsel to commence a five week trial on approximately fifteen minutes notice constituted denial of due process and the right to assistance of counsel. Such action by the Trial Court was an abuse of discretion.

The appellants hereby adopt the Specification of Errors submitted by other appellants and incorporate by reference argument thereunder.

CONCLUSION

It is respectfully submitted:

a. That this cause should be reversed and remanded with directions to enter a Judgment of Acquittal on behalf of B. J. GRADSKY.

b. That this cause should be reversed and remanded for a new trial for NORMAN GRADSKY and ROBERT GRENE.

E. DAVID ROSEN
E. David Rosen
Attorney for Appellants
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19 West Flagler Street
Miami, Florida

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the appellant George Levine in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant George Levine to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 9, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 9, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 9, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE,
Chief Judge.

Dated: (ORIGINAL FILED APRIL 19, 1965)

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Florida
(APRIL 9, 1965)

On Petitions for Rehearing

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM:

It is ORDERED that the petitions for rehearing filed by appellants Hogue, Roberts, Norman Gradsky, B. J. Gradsky, Robert Grene and Levine, be, and the same is, hereby DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1964

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for The Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons; the judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten; the sentences against Roberts on counts one, two, four, five, seven and nine are set aside; the judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten; the sentences against Schiff on counts one, three, four, five, six and seven are set aside; the judgment against Gibbons is affirmed as to the sentences on counts

six and ten; the sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside; and that this cause be, and it is hereby remanded to the said District Court for further proceeding not inconsistent with the opinion and judgment of this Court.

March 11, 1965

Issued as Mandate:

APPENDIX I

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless or a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Title 15, United States Code, Annotated, Section 77q(a), Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, United States Code Annotated, Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the

person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code Annotated, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Trial Jurors

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 196

NO. 234

NORMAN GRADSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIDNEY M. DUBBIN, ESQ.
531 Pan American Building,
West Palm Beach, Florida.
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO.

NORMAN GRADSKY,
Petitioner

versus

UNITED STATES OF AMERICA,
Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Norman Gradsky, petitioner herein, by and through his undersigned attorney, and respectfully prays this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court denying rehearing entered on the 9th day of April, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice of counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (1) (2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 11th day of March, 1965. (Appendix A.), and thereafter a petition for rehearing was timely filed, and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

QUESTIONS PRESENTED

I.

Whether the court erred in overruling a challenge for cause directed to a juror who made a statement that she believed the defendants must come forward with evidence.

II.

Whether the court committed fundamental error in permitting the Prosecutor to suppress the records of Security Guaranty Company which were essential to the cause and which were highly material to the Government's case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been com-

mitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 15, United States Code Annotated, Section 77q(a), Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, United States Code Annotated, Section 1341.

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the

purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949 c. 139, Sec. 34, 63 Stat. 94.

Title 18, United States Code Annotated, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Rule 24, paragraph (b), Federal Rules of Criminal Procedure, Trial Jurors

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged

is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

STATEMENT

This petition seeks review of a judgment of the Court of Appeals (annexed hereto as Appendix C.) affirming an order entered by the District Court, wherein your petitioner and nine co-defendants were convicted for violating the Anti-Fraud provisions of the Securities Act of 1933, 15 U.S.C. Section 77q(a) and the Mail Fraud Statute, 18 U.S.C. Section 1341, and conspiring to violate these laws, 18 U.S.C. Section 371.

The indictment charged a scheme under which the defendants were alleged to have sold to the public, notes of Security Finance Company which were to return 12% and later 8% interest.

Before and after the jury was impaneled, defendant requested additional peremptory challenges, which were denied. Among the jurors who were impaneled was a Mrs. Lewis who stated that in effect she believed that the defendants had an equal burden with the prosecution and that the defendants should come forward with evidence in this case. Mrs. Lewis was challenged for cause. The Court overruled the challenge without any limiting admonition to the jury.

The defendants were tried and petitioner was found guilty of 10 counts and was sentenced to imprisonment of 20 years.

During the trial a motion was made by one of the defendants to produce the records of the Security Guaranty Company. Said motion was dismissed. The testimony of one of the Government's witnesses, George Callahan, indicated

that these records were recently located in the Courthouse but at the time of the trial were in the possession of a postal inspector who had left town that morning. Testimony as to the contents of these records were used to link Gradsky with control of the Security Finance Company.

In a normal manner this cause came on oral argument before the United States Court of Appeals which entered its opinion on March 11, 1965, affirming the District Court (Appendix A.) and subsequently denied petitioner's petition for rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought in this petition should be granted because your petitioner was denied the rights provided for in the Sixth Amendment to the Constitution of the United States.

Amendment VI of the Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .". (Emphasis added).

The record discloses that a juror stated before the Court and in the presence of other jurors that she felt that both sides had to prove their case.

The Court impliedly affirmed this juror's belief by failing to make any contrary statement or admonition. The defendant challenged the juror for cause but the Court overruled the challenge and denied the defendant's request for additional peremptory challenges. The effect of this ruling by the Court was an obvious denial of the defendant's right to a trial before an impartial jury. The effect of the Court's ruling was not only to permit a juror, not wholly impartial, in the jury box, but in addition, create the possible inference in the feelings of the other jurors that the defendant had an equal

burden of proof. This error was further compounded by the Court's instruction to the jury as follows:

> "The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . they should be put up on trial . . . and unless they answered they should be convicted."

In addition to the error referred to above, petitioner was further prejudiced by the fact that the Government knowingly permitted important records to be removed from the Courthouse without any advice to counsel for the many defendants. These records were germane to the defense in that they were relied upon by the prosecution to connect the petitioner with control of the corporation which issued the notes.

Counsel for defendant Grene moved to produce the records of Security Guaranty Company. This motion was denied. Securities Exchange Commission Agent Callahan testified that Credit Finance Company was owned by Security Guaranty Company and that defendant Gradsky had controlling interest in Security Guaranty Company. He further testified that he saw the stock book of Security Guaranty Company in the Courthouse. When inquiry was made of Mr. Callahan as to the location of the books and records of Security Guaranty Company, he replied that the postal inspectors had the books and that he believed that the postal inspector had left town that morning.

Thus, the Government presented evidence which referred to books and records but did not produce these books and records for the defendant's use. Even if we assume that the prosecutor's failure to produce the evidence was not the result of guile or a desire to prejudice, the impact was the

same, in that it prevented petitioner from seeing all information necessary to secure a fair trial. Petitioner suggests that the cases of *Napue v. People of the State of Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; Berger v. U.S., 295 U.S., 78, 88, 55 S. Ct. 629, 79 L. Ed. 1341;* Greenhill v. U.S., 298 F. 2d 405 (5th Cir. 1962), are controlling over this matter and for the foregoing reasons this Court should grant a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,
SIDNEY M. DUBBIN, ESQ.
531 Pan American Bldg.,
West Palm Beach, Florida.
Attorney for Petitioner.

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH COURT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

TUTTLE, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q) (a), and the Mail Fraud

Statute, 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be deal with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to

the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's' financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false,

their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel v. U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.
>
> "The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . and unless they answered they should be convicted.
>
> "And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez v. United States*, 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the courtroom and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous; it was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants

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[1] This statute provides in part as follows: "Whenever on trial for a violation of this subsection, the defendant is shown to have had or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.
>
> "On the contrary, they were within their rights in not testifying in the case.
>
> "So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a

postal inspector for proper use by the United States. It is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The government expert, the accountant Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries. It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States v. Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d. 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill v. United States*, 5 Cir., 298 F. 2d. 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire*, this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand

[2] It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with the evidence in this case if he is on trial?" She answered, "I think so." Thereupon the court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire*, which we seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there no no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was designed to facilitate proof of business records seem to have been fully met here. The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll v. United States*, 9 Cir., 1963 326 F. 2d 72, and *Taylor v. United States*, 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not to be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well established that such books and records are admissible only against corporate offices with access and control thereof, who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records

do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company*, but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a participant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer par-

ticipation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused persons. See *Greenhill v. United States*, 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending here, Gibbons, Schiff and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960,

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[3]Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two, four, five, seven and nine must be set side. Gibbons was an employee of the company for approximately two months—from the end of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood v. United States*, 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan v. United States*, 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten.

The sentences against Schiff on counts one, three, four, five, six and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

APRIL 9, 1965

Re:
No. 19974
NORMAN GRADSKY, ET AL
Versus
UNITED STATES OF AMERICA

Gentlemen:

You are hereby advised that the court has today entered an order denying the petitions for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 19974

D. C. Docket No. 1271-Orl-Cr.

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS,

Appellants.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for The Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons; the judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten; the sentences against Roberts on counts one, two, four, five, seven and nine are set aside; the judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten; the sentences against Schiff on counts one, three, four, five, six and seven are set aside; the judgment against Gibbons is affirmed as to the sentences on counts six and ten; the sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside; and that this cause be, and it is hereby remanded to the said District Court for further proceeding not inconsistent with the opinion and judgment of this Court.

March 11, 1965

Issued as Mandate:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 112

GEORGE LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 125

ROBERT B. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 230

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 234

NORMAN GRADSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 342 F. 2d 147.

JURISDICTION

The judgment of the court of appeals was filed on March 11, 1965. Petitions for rehearing were denied on April 9, 1965. The petition for a writ of certiorari in No. 112 was filed on May 6, 1965, and in No. 125 on May 10, 1965. In No. 230 and No. 234, the time to file petitions for writs of certiorari was extended by Mr. Justice Black to June 8, 1965, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

All petitioners raise the following issues:

1. Whether the district court abused its discretion in refusing to sustain a challenge for cause or grant additional peremptory challenges.

2. Whether the district court erred in its charge to the jury.

The following additional questions are raised:

3. Whether the evidence supports the convictions on certain substantive counts of petitioners Levine (No. 112) and Roberts (No. 125).

4. Whether the district court erred in permitting testimony regarding petitioner Roberts' use of an alias, and in allowing the indictment, which mentioned the alias, to go to the jury (No. 125).

5. Whether the district court abused its discretion in denying petitioner Grene's motion for continuance (No. 230).

6. Whether petitioner Grene was denied the assistance of counsel at trial and at the court of appeals (No. 230).

7. Whether the United States Attorney suppressed evidence material to petitioner Gradsky's defense (No. 234).

STATEMENT

After a trial by jury, petitioners and six co-defendants were convicted under a ten-count indictment in the United States District Court for the Southern District of Florida of defrauding purchasers of securities, of mail fraud, and of conspiracy, in violation of 15 U.S.C. 77q(a), 18 U.S.C. 1341, and 18 U.S.C. 371, respectively (R. 4416–4420).[1] They were given consecutive sentences on each count, as follows: Levine (No. 112)—15 months (total of 12½ years); Grene (No. 230)—18 months (total of 15 years); Gradsky—2 years (total of 20 years). Roberts (No. 125) was given one year on each count, but only four counts were affirmed by the court of appeals. The facts may be summarized as follows:

1. Petitioners and their co-defendants engaged in a scheme by which they sold corporate notes to the public, representing that such notes would pay substantial interest, and then used the funds thus invested for their own enrichment and benefit. It was for that purpose that the Credit Finance Corporation (hereinafter "C.F.C.") was organized by petitioner Norman Gradsky and incorporated under the laws of Florida on November 19, 1958 (R. 759, 768–769, 3630). Extensive television and newspaper advertis-

[1] Reference is to volumes II through XXV of the record, which are consecutively paginated. Volume I of the record is independently paginated, and will be referred to as "I R.".

ing, promising returns of 12% and 8% interest[2] was employed to induce the public to invest in C.F.C. (R. 1067, 1219, 1232, 1339–1341, 1395, 1531, 1817, 1831, 1191, 1942–1943, 2116, 2169, 2225, 2322, 2359, 2460, 2493–2496). Investors were falsely told that C.F.C. was strictly regulated by the State of Florida (R. 1397, 1454, 1820, 1833, 1950, 1962, 2339, 2496, 2565–2566) and by the Securities and Exchange Commission (R. 1917, 2135, 2709), and that it was insured (R. 1239, 1408, 1750, 1752, 1961, 2228, 2342, 2709). It was falsely represented that C.F.C. was engaged in the business of financing used cars, and real-estate development programs (R. 1070, 1118–1119, 1171–1172, 1397, 1821, 1918–1920, 1949, 2101–2103, 2124, 2150, 2170–2171, 2228, 2325–2326, 2347, 2364, 2464–2465, 2497, 2705); that it was a successful and prospering company (R. 1124, 1841, 1920, 2325–2326, 2342); and that investments with C.F.C. were as safe as those made with a bank (R. 1069–1070, 1119, 1124, 1171, 1220–1221, 1239, 1397, 2228–2229, 2326, 2579, 2709). In addition to high rates of interest, C.F.C. offered a wide variety of prizes to potential investors (R. 1076, 1122, 1127, 1152, 1163, 1180–1181, 1225, 1240, 1701, 1841–1842, 1847, 1959–1960, 2130, 2136, 2176, 2225, 2347, 2368–2369, 2500). These inducements persuaded more than 180 individuals, particularly elderly people, to invest a total of $598,496.74 with C.F.C. (R. 3439–3441).

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[2] The interest offered was lowered from 12% to 8% because of a limitation imposed by Florida law (R. 1244, 1349, 1841, 2346).

Petitioners and their co-defendants were able to maintain the confidence of the investors by making "interest" payments on schedule; the "interest" consisted of the investors' own capital, however, and not the represented earnings (R. 1090, 1125, 1155, 1223, 1245, 1356, 1419, 1447, 1452, 1754, 1824, 1871, 2179–2180, 2211, 2238, 2304, 2332, 2351, 2374, 2468, 2503, 2581, 2595).[3] Due to the precarious financial condition of the operation, many of these "interest" payment checks were late or were returned because of insufficient funds (*e.g.*, R. 1163–1168, 1224, 1447, 1452, 1525, 1754, 1848, 1953–1955, 2140, 2239, 2329–2330, 2351, 2468, 2581–2582). Eventually, the "interest" checks stopped altogether and the victims lost the principal funds they had invested (R. 1091, 1125, 1165, 1224, 1230–1245, 1357, 1825, 1850, 1924, 1955, 2180, 2212, 2239, 2304, 2333, 2352, 2374, 2470, 2503, 2583, 2595, 2712).

By deceptive transfers of property and inflation of assets (R. 3450–3475), the conspirators were able to create a false financial picture of C.F.C.'s operations, and acquire for themselves a substantial portion of the proceeds from the sale of C.F.C.'s corporate notes (R. 3447–3480, 3489–3490, 3503–3512). C.F.C.'s funds were also used to pay for automobiles,

[3] An examination of C.F.C.'s books by the Securities and Exchange Commission revealed that C.F.C. operated at a loss at all times (R. 3446); that C.F.C. had no net earnings with which to pay interest or to return principal on the investments made (R. 3480); and that the books falsely showed non-existent assets and falsely concealed liabilities (R. 3447, 3476, 3489–3490).

gifts, and home furnishings purchased by petitioner Norman Gradsky, or by the related corporations which he controlled (R. 2613–2616, 3026, 2145, 3181–3184, 3459–3460). Petitioner George Levine utilized similar techniques to siphon off over $15,000 of C.F.C.'s funds for his own use during his management of the enterprise from July 1960 until its bankruptcy in November 1960 (R. 959, 1820, 2683–2684, 3107–3111).

2. The roles of the petitioners were as follows:

(a) Norman Gradsky was the organizer and operator of the scheme until George Levine took over its management in July 1960 (R. 1395, 1919, 1959, 3458, 3630–3637).

(b) George Levine managed the operation from July 1960 until its bankruptcy, diverted funds from C.F.C. to his own use, and fraudulently induced investors to put their money into C.F.C. (R. 1163–1168, 1953–1954, 1820, 2464, 2683–2684, 3107–3111, 3396–3397, 3872–3873).

(c) Robert B. Roberts was a vice-president of C.F.C. and a salesman (R. 1390, 1407–1408, 1752, 2228, 2229). Roberts extensively misrepresented the condition and purpose of C.F.C. to numerous investors as a part of his sales technique (R. 1408, 1752, 1753, 2228, 2229).

(d) Robert Grene served as the representative of petitioner Norman Gradsky after Gradsky resigned as president of C.F.C. and transferred the C.F.C. stock to Security Guaranty Company (R. 3054–3060). Grene became president and chairman of the board

of C.F.C. and remained in that capacity until petitioner Levine took over the operation in July 1960 (R. 1394, 3054–3060). Grene was also organizer and president of Security Guaranty Company, which Norman Gradsky controlled, and through which Gradsky controlled C.F.C. (R. 3458).

ARGUMENT

1. All petitioners claim that the district court erred in allowing a juror, Mrs. Elizabeth Lewis, to serve in view of her answers to *voir dire* questioning conducted by counsel for a co-defendant. In response to defense counsel's questioning, Mrs. Lewis stated that she would listen to both sides before making up her mind (R. 599). When counsel called her attention to the fact that petitioners and their co-defendants did not have to "say a single word in this case," she answered, "Oh! I see" (R. 600). Defense counsel asked, "You understand that the burden is upon the Government to establish their case?" and Mrs. Lewis answered, "Oh. Yes, I see what you mean" (R. 600). In response to a further question as to whether she would require the government to prove its case, Mrs. Lewis stated, "I think it should be both sides to prove it. Maybe I don't understand your question" (R. 600). Defense counsel then asked, "Then it is your view that both sides should come forward with evidence in this criminal case?" and Mrs. Lewis answered, "Well I thought that was the procedure. I never served" (R. 600). Finally defense counsel asked Mrs. Lewis whether she had a

"firm conviction" that a defendant should come forward with evidence if on trial, and she said, "I think so" (R. 601). At that point, the trial judge intervened and stated, "She doesn't know about those things" (R. 601). Petitioners and their co-defendants challenged Mrs. Lewis for cause, but the district court denied the challenge (R. 601). Having already exhausted the ten joint peremptory challenges provided for by Rule 24(b), F.R.Crim.P., the defendants unsuccessfully moved for additional peremptory challenges (R. 604).

There is no evidence in the record to indicate that Mrs. Lewis was anything but a fair and impartial juror. She knew nothing about the case prior to trial (R. 571), had not followed the newspaper accounts of the case (R. 589), and had no opinion on the merits of the case (R. 573, 579). She was not connected with the government in any capacity (R. 578), nor was she acquainted with or related to any of the petitioners or co-defendants (R. 579). She stated that she would be controlled by the law and the evidence (R. 581–582), that she understood the presumption of innocence (R. 589), and that she would listen to all of the evidence before forming an opinion (R. 590). This case was her first experience as a juror (R. 588), and it is clear that the answers about which petitioners complain reflect nothing more than her initial unfamiliarity with rules of law which were later given to the jury and thoroughly explained by the court. There is no indication that she did not fully understand and follow the court's charge in

this area, which included instructions on the presumption of innocence, the government's burden of proof, and the prohibition against drawing any adverse inference from the failure of petitioners and their co-defendants to testify (R. 4299, 4302). In the absence of evidence to the contrary, it is presumed that she did follow the court's instructions. *Delli Paoli* v. *United States,* 352 U.S. 232, 242. Jury competency is a question for the wide discretion of the trial judge, and the exercise of that discretion will not be interefered with except on a clear showing of abuse. *Lyda* v. *United States,* 321 F. 2d 788, 791 (C.A. 9); *Beck* v. *United States,*,298 F. 2d 622, 629 (C.A. 9), certiorari denied, 370 U.S. 919; *United States* v. *Sferas,* 210 F. 2d 69 (C.A. 7), certiorari denied, *sub nom. Skally* v. *United States,* 347 U.S. 935; *Holmes* v. *United States,* 134 F. 2d 125 (C.A. 8), certiorari denied, 319 U.S. 776. There was no abuse of discretion in refusing to discharge the juror merely because of her lack of familiarity with the law.

2. All petitioners assert that the district court erred in its instructions on the effect to be given to the indictment (Levine Pet. 2; Roberts Pet. 40; Grene Pet. 3; Gradsky Pet. 7). Petitioner Roberts also complains of numerous other alleged errors in the charge (Roberts Pet. 2–4, 11–35, 38–39).

The isolated remark which petitioners challenge was:

> The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it * * * they

> should be put up on trial * * * and unless they answered they should be convicted (R. 4299).

They contend that this isolated language amounts to a comment by the trial judge on the defendants' failure to take the witness stand, and an instruction that they should be convicted because they did not offer evidence. The remark is not, in our view, subject to this construction even in isolation, and it certainly could not have been so understood when considered in light of the district court's overall instructions. The court instructed the jury that the indictment was "no evidence whatever" and that it has "no probative force" since it is a "mere formal charge" (R. 4298). It went on to say that the indictment was not testimony of any kind, and then repeated that it does not have "any probative force whatsoever" (R. 4299). Further, the court instructed on the presumption of innocence (R. 4299), stated that the burden of proof is on the government (R. 4299), and specifically told the jury that it was to draw no adverse inference from the defendants' failure to take the stand (R. 4302). Plainly, there was nothing in the charge to suggest there was any obligation on petitioners or their co-defendants to take the stand, and the challenged language bore no such implication.

The complaints of petitioner Roberts have no substance when considered in relation to the whole charge. At the conclusion of the five-week trial, the district court was presented with some fifty-three written requests for instructions by the parties

(I R. 83–138, 139–189). Petitioner Roberts himself presented requests for twenty-seven instructions (I R. 146–189). They could not all be given in *ipsissimis verbis*. The district court fully and fairly charged the jury, using colloquial language to make the legal principles commonly understandable whenever possible. At the conclusion of the charge, requests for additional instructions were invited, and the instructions requested at that time were either given, or were rejected because they had already been given in one form or another (R. 4323–4325, 4327–4330, 4333–4335, 4405). This was true of the three requests for additional instructions made by petitioner Roberts (R. 4325–4330, 4405). The district court then invited further requests for instructions, but the defendants offered none (R. 4347). In light of the provisions of Rule 30, F.R. Crim. P.—which are particularly applicable in so complex a case as this one with its many requests for instructions—petitioners should not now be heard to complain that certain instructions were omitted. Read in their entirety, the instructions fully and fairly placed the case before the jury.

3. Petitioners Levine and Grene argue that they should not have been convicted on the substantive counts based on events before or after their entry and active participation in the conspiracy (Levine Pet. 2–3, 5; Grene Pet. 3–4, 8–9). Both overlook the principle that the law makes each conspirator liable for the acts of every other conspirator done in furtherance of the conspiracy, so that one who joins

a conspiracy takes it as it is and is held accountable for the prior conduct of his co-conspirators. *United States* v. *Sobell*, 314 F. 2d 314, 326–327 (C.A. 2), certiorari denied, 374 U.S. 857; *United States* v. *Sansone*, 231 F. 2d 887, 892–893 (C.A. 2), certiorari denied, 351 U.S. 987; *Bogy* v. *United States*, 96 F. 2d 734, 741 (C.A. 6), certiorari denied, 305 U.S. 608. This principle is particularly applicable when, as here, the alleged "late joiners" were central figures in and major beneficiaries of the conspiracy. For this reason, the court of appeals properly distinguished between Levin and Grene on the one hand and the salesmen-defendants on the other. Petitioner Grene also ignores the rule that a conspirator is accountable for the conduct of his co-conspirators, unless he withdraws by some affirmative act disavowing or repudiating the conspiracy. *Hyde* v. *United States*, 225 U.S. 347; *Blue* v. *United States*, 138 F. 2d 351 (C.A. 6), certiorari denied, 322 U.S. 736; *Levey* v. *United States*, 92 F. 2d 688, 691 (C.A. 9), certiorari denied, 303 U.S. 639; *Baldwin* v. *United States*, 72 F. 2d 810 (C.A. 9), certiorari denied, 295 U.S. 761.

Petitioner Levine assumed control of the operation and management of C.F.C. some time in July 1960 (R. 2683, 2684). The evidence conclusively establishes that Levine knew the condition of C.F.C. and was aware of the corporation's real function. Levine's former attorney testified that upon examining the books of C.F.C. at Levine's request after Levine assumed control of the company, he informed Levine that he could not "make heads nor tails" of an abstract

covering certain real property purportedly held by C.F.C., and that the abstract did not even indicate that C.F.C. owned the property in question (R. 967). Levine operated the company the way it had previously been run, and he extracted over $15,000 from C.F.C. for his own use (R. 1820, 2683–2684, 3107–3111). In view of these facts, the jury was amply justified in finding that Levine knowingly entered into and remained in the conspiracy as alleged, in order to defraud those who had invested in C.F.C.

Petitioner Grene became president and chairman of the board of C.F.C. when Gradsky resigned as president in April 1960 (R. 1394, 1692–1693, 1708, 2257, 3054–3060, 3458). Thereafter, Grene served as Gradsky's alter ego, so that Gradsky retained concealed control of C.F.C. (R. 1692–1693, 1698, 3458, 3633). Grene actively assisted in the creation and maintenance of a facade of financial soundness for C.F.C., as demonstrated by his submission of a financial statement to the General Services Administration in April 1960 which falsely listed as an asset $51,000 worth of real estate that C.F.C. did not own (R. 3491). Grene also supervised the work of co-defendant Hogue, a C.F.C. vice-president and division manager, who made numerous sales of C.F.C. notes to investors on false representations (R. 1119–1120, 1239, 1396–1397, 1406, 1419, 1424, 1820, 1920, 2135–2136, 2565, 3489). He was active in negotiating a contract with the Grant Advertising Company to handle publicity for both C.F.C. and the Security Guaranty Company (R. 2257–2264). There is no evi-

dence that he performed any affirmative act of withdrawal after petitioner Levine became president. The jury was, therefore, justified in finding that petitioner Grene had a continuing interest in the conspiracy and its profits until its expiration in November 1960. *United States* v. *Cohen,* 145 F. 2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799; *Blue* v. *United States, supra,* 138 F. 2d 351, 361 (C.A. 6), certiorari denied, 322 U.S. 736.[4]

4. a. The indictment alleged that petitioner Roberts was also known as Robert Schoonmaker, and the petitioner introduced a court order indicating that his name had been legally changed from Robert B. Schoonmaker to Robert B. Roberts (R. 63–67). Mrs. Hightower, an employee of C.F.C., testified that a co-defendant, Mrs. Hogue, had told her that Roberts had purchased a hi-fi set under the name of Schoonmaker, and that he had instructed Mrs. Hogue to give a false credit reference for him in regard to the purchase (R. 1410–1411). That testimony was clearly admissible against Mrs. Hogue because it reflected upon the nature of the dealings between herself and an alleged co-conspirator, and it is not clear from the record whether it was admitted against Roberts (see R. 1413). In any event, it was a minor fragment of a long trial in which misrepresentations by Roberts to investors were clearly shown. Even assuming that it should not have been admitted, the

[4] The position of these petitioners was obviously very different from that of the defendant-salesmen whose convictions the court of appeals reversed as to counts in which they did not individually participate.

error was not prejudicial. The jury would not have been inflamed against Roberts merely because he used a former legal name in making a purchase.[5]

b. The district court did not err in sending a copy of the indictment to the jury in response to the jury's request for it. In protracted cases such as this one, involving numerous counts and multiple defendants, reference to the indictment often serves as a helpful guide for delineation of the issues the jury is called on to decide. See *United States* v. *Press*, 336 F. 2d 1003, 1016 (C.A. 2), certiorari denied, 379 U.S. 965. Petitioner Roberts' counsel stated at trial that he had no objection to the indictment going to the jury so long as an instruction was given to disregard the reference to the alias (R. 4370–4371). The district court's instruction not to consider the indictment as evidence amply covered counsel's request in that respect. See *United States* v. *Walker*, 313 F. 2d 236 (C.A. 6), certiorari denied, 374 U.S. 807.

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[5] Mrs. Hightower also testified to other statements made to her by Mrs. Hogue with respect to Norman Gradsky's use of corporate funds at the dog races and the fact that the corporation did not own land reflected in its books. The testimony was admitted subject to connection (R. 1424–1425), and no further ruling was made with respect thereto. The lack of ownership of the real estate was otherwise proved. The trial judge charged the jury that only statements in furtherance of the conspiracy were admissible against the others (R. 4405–4406). Whether or not these statements were properly deemed in furtherance of the conspiracy (see *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919), their admission did not prejudice Roberts—who is the only petitioner claiming that it was reversible error to admit them (see Roberts Pet. 41–42).

5. The indictment was returned in June 1961. In April 1962, trial date was set for June 11, 1962. On June 8, 1962, Grene's counsel, who had represented him as early as August 1961 (I R. 30), moved, with Grene's consent, to withdraw on the ground that Grene had not been able to pay for his legal services (I R. 54–55; R. 28–29). On the morning of trial petitioner Grene first gave notice to the court that he would need appointed counsel. An attorney was appointed to represent him, and he began doing so that afternoon with the empanelment of the jury (R. 88–89). Although the district court denied counsel's motion for a continuance, it did adjourn for four days to enable Grene's attorney to prepare for trial (I R. 70; R. 89–90, 679–681). The record reflects that Grene's appointed attorney conducted an able and thorough defense throughout the trial of the case. In view of petitioner Grene's own negligence in failing to inform the court—until the day of trial—of his financial situation and consequent need for appointed counsel, and in light of the number of other persons (co-defendants, witnesses, etc.) involved, it was clearly not an abuse of the district court's discretion to deny the motion for a continuance.

6. Petitioner Grene also asserts that he was denied the assistance of counsel, both at trial and before the court of appeals, because: (1) at trial, during brief absences of his appointed counsel, Grene was represented by attorneys for various other defendants, and (2) before the court of appeals, Grene was repre-

sented by the attorney for petitioner Gradsky and co-defendant B. J. Gradsky (Grene Pet. 2–3, 8). There is no merit to either contention.

During the trial of this case, which consumed five weeks, it was not possible for every retained or appointed attorney to be present at all times for every session of court. The trial judge allowed "stand-in" representation by other counsel for various petitioners and co-defendants during those brief periods when their own counsel were unavoidably absent. This was done with the knowledge and consent of all defendants and counsel concerned. No objection was made to the procedure at any time during the trial of the case. Speculation as to possible conflict is insufficient, under these circumstances, to establish prejudice as the result of the temporary "stand-in" representation. See *Butler* v. *United States,* 317 F. 2d 249, 259–260 (C.A. 8), certiorari denied, 375 U.S. 838.

Nor is there evidence in the record of any conflict of interest between petitioner Grene and petitioner Gradsky or co-defendant B. J. Gradsky, either at trial or before the court of appeals. The attorney for the Gradskys at trial represented the Gradskys and petitioner Grene before the court of appeals (Grene Pet. Appendix C, D). Petitioner Grene at no time expressed dissatisfaction with that counsel before the court of appeals. In view of these facts, there is no basis to petitioner Grene's present claim of error based on speculative and unsupported assertions of conflict of interest.

7. Petitioner Gradsky's contention that the district court erred in "permitting" the United States At-

torney to "suppress" the records of Security Guaranty Company (Gradsky Pet. 2, 5–8) is without substance since there was no suppression of records whatever. After the close of the government's case, the attorney who represented petitioner Grene during the trial, David S. Clark, testified that, on the day of his appointment he had asked to see "certain records of the Security Guaranty Company," and "other records" as well (R. 4052). He was allowed to inspect such records for a brief time in the rooms at the courthouse where they were being held (R. 4053, 4673–4674). An individual described by Clark as a "government agent" asked him to leave, and told him that he could see the records, or copies of them, later (R. 4055, 4674). The records of C.F.C. were present in court during the trial of the case, and were available to all defense counsel. But counsel were informed that the records of Security Guaranty Company had been taken to Jacksonville, Florida, by a postal inspector (R. 3634, 3786).[6] Mr. Clark filed a general motion to produce each document "which the Government anticipates offering into evidence" (I R. 69; R. 4677), but he did not specify the name of any particular company in the motion (I R. 69), nor did he take any other steps to require production of such

[6] The record does not specify the purpose for which the records were transported to Jacksonville, but petitioner Grene, who was a defendant in the case in which they were used in Jacksonville (*United States* v. *Grene*, S.D. Fla., 12264–Cr.–J–EC), does not claim to have been ignorant of why they were there. It is a fair inference that the other defendants also knew where they were and why they had been transported.

"documents." No motion was made at any time by any petitioner or co-defendant for production of the records of Security Guaranty Company (R. 4058, 4676), although at one point, the district court suggested that the defense subpoena such records if they desired to examine them (R. 3788). Thus, it is plain that Gradsky knew where the records were and who had them, but was not interested in getting them.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 112

GEORGE LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 125

ROBERT B. ROBERTS, PETITONER

v.

UNITED STATES OF AMERICA

No. 230

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 234

NORMAN GRADSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is filed pursuant to the Court's request of October 8, 1965, in which we were asked to respond to the following questions:

1. What evidence in the record, if any, refutes the contention that any or all of the petitioners were con-

victed of one or more substantive offenses committed by co-conspirators before petitioners joined the conspiracy or after they severed their connections with the fraudulent enterprise; and

2. Assuming the record sustains the contention, what legal justification exists for such liability.

DISCUSSION

I. THE APPLICABLE PRINCIPLES OF LAW

Before discussing the facts, we set forth the principles of law which we believe govern this case with respect to the questions asked.

A. *Persons joining a conspiracy after its inception.*—As to such persons, it is an established principle of conspiracy law that one who joins a conspiracy after its inception takes it as it is and is accountable for the prior conduct of his co-conspirators to the extent that evidence of their prior acts in furtherance of the conspiracy is admissible against him. *United States* v. *Sobell,* 314 F. 2d 314, 326–327 (C.A. 2), certiorari denied, 374 U.S. 857; *United States* v. *Sansone,* 231 F. 2d 887, 892–893 (C.A. 2), certiorari denied, 351 U.S. 987; *Bogy* v. *United States,* 96 F. 2d 734, 741 (C.A. 6), certiorari denied, 305 U.S. 608. With respect to substantive offenses, it is also established that a party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy. See *Pinkerton* v. *United States,* 328 U.S. 640, 645–647.

It does not follow, however, that a late-comer is liable as a principal for substantive offenses com-

mitted in furtherance of the conspiracy before he joined it.[1] There is a significant difference between the evidentiary rule and the principles governing substantive liability. What has gone before is relevant to show the nature of a conspiracy which a late-comer joins, and the new conspirator, if he knows the purpose of the unlawful agreement, effectively ratifies and adopts the earlier acts and declarations of his partners in crime when he associates himself with the venture. But one cannot commit a crime by ratifying, after the fact, the criminal act of the principal offender. The *Pinkerton* rule that a member of a conspiracy is substantively liable for a crime encompassed by the conspiracy even if it is actually committed by another rests on the assumption that the absent conspirator delegated his partners to carry out the plan they previously devised. See 328 U.S. at 646–647. That rationale cannot apply to one who was not a member of the conspiracy when the substantive offense was committed.

We believe this conclusion is implicit in the part of the *Pinkerton* decision dealing with the conviction of Daniel Pinkerton of substantive offenses in which he did not participate directly. While the Court rejected the contention that participation in a conspiracy is not alone sufficient to sustain a conviction of a substantive offense committed in furtherance of the con-

[1] There is language in *Bogy* v. *United States*, *supra*, indicating that such liability results from the application of the two principles cited above. On the facts of that case, however, the question was not involved.

spiracy (328 U.S. at 646–647), it sustained Daniel's conviction on the basis that the trial court had correctly (328 U.S. at 645)

> * * * submitted [the question] to the jury on the theory that each petitioner could be found guilty of the substantive offenses, if it was found *at the time* those offenses were committed *petitioners were parties* to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it. [Emphasis supplied.]

Direct evidence as to the time a person joined a conspiracy is not required, however, since, like the common purpose and plan itself, that fact may be inferred from a development and a collocation of circumstances. *Glasser* v. *United States,* 315 U.S. 60, 80. And only slight evidence is necessary to connect a person with a conspiracy already proved to exist. *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818; *Poliafico* v. *United States,* 237 F. 2d 97, 104 (C.A. 6), certiorari denied, 352 U.S. 1025.

B. *Persons withdrawing from a conspiracy.*—In relation to both the conspiracy and substantive charges, the law is clear that one who has effectively withdrawn from a conspiracy is not liable for anything that occurs after his withdrawal. *Hyde* v. *United States,* 225 U.S. 347. This rule applies, however, only upon a showing of an affirmative act of withdrawal. *Hyde* v. *United States, supra; Blue* v. *United States,* 138 F. 2d 351 (C.A. 6), certiorari denied, 322 U.S. 736; *Levey* v. *United States,* 92 F. 2d

688, 691 (C.A. 9), certiorari denied, 303 U.S. 639; *Baldwin* v. *United States,* 72 F. 2d 810 (C.A. 9), certiorari denied, 295 U.S. 761. The question whether such an affirmative act of withdrawal has been shown is, under *Hyde, supra,* an issue to be decided by the jury, and the jury was so instructed in this case (R. 4311, 4331–4332).

II. THE FACTS OF THIS CASE

A. *The indictment.*—The indictment contained nine substantive counts and one conspiracy count. Counts one through five charged substantive violations of 15 U.S.C. 77q(a); counts six through nine charged substantive violations of 18 U.S.C. 1341; and count ten charged conspiracy to violate these statutes, in violation of 18 U.S.C. 371.

The dates on which the substantive offenses were committed, tabulated in chronological order, were as follows:

April 21, 1959	Count One
May 8, 1959	Count Seven
January 21, 1960	Count Eight
January 25, 1960	Count Six
March 17, 1960	Count Three
June 8, 1960	Count Four
June 8, 1960	Count Five
August 25, 1960	Count Two
September 15, 1960	Count Nine

Count ten alleged that the conspiracy existed prior to November 19, 1958, and continued until November 10, 1960.

The jury convicted all petitioners on all counts, and the court of appeals affirmed as to Levine, Grene and Gradsky. As to petitioner Roberts, his conviction was affirmed only on the conspiracy count and substantive counts three, six, and eight.

B. *The proof as to each petitioner.*

1. Petitioner Gradsky was the organizer and controlling operator of the conspiracy until petitioner George Levine took over its management in July 1960 (R. 1395, 1919, 1959, 3458, 3630–3637). Consequently, there can be no doubt of Gradsky's participation in, and responsibility for, the substantive offenses which were committed in furtherance of the conspiracy from the time of its inception in November 1958 to July 1960 (*i.e.*, all substantive offenses except those charged in counts two and nine). Although the record indicates that Levine assumed the *management* of the scheme in July 1960, it does *not* show, either directly or indirectly, that Gradsky withdrew from the conspiracy. On the contrary, there is evidence that Gradsky still retained a significant degree of control over the enterprise and that he exercised such control as late as August 1960. A representative of the Orlando Sentinel-Star was present in the C.F.C. offices in August 1960 for the purpose of arranging for further C.F.C. newspaper advertising (R. 2523). Gradsky was present at that meeting, along with Levine, and he participated in the discussion regarding the advertising to be purchased for C.F.C. (R. 2523–2525). Also present was Gradsky's attorney, co-defendant Leonard Glaser (R. 2523–2525). At the meeting, C.F.C. contracted for $1,800 worth of newspaper advertising, and such advertising continued in the Melbourne paper until September 30, 1960, and in

the Orlando paper until October 30, 1960 (R. 2517–2518, 2524–2525). This evidence was sufficient, we believe, to support the inference that Gradsky was still a principal figure in the conspiracy after he formally relinquished its management. It suggests that he retained an interest in the scheme beyond August 1960, since he was concerned with future newspaper advertising. There is no evidence that Gradsky withdrew from the conspiracy after that date by any affirmative act disavowing or repudiating the venture. The jury therefore had a right to conclude that Gradsky was still a participant in the conspiracy at the time of the substantive offenses charged in counts two and nine (August 25 and September 15, 1960, respectively). *Hyde* v. *United States, supra,* 225 U.S. at 369.

2. Petitioner Roberts' convictions on counts one, two, four, five, seven, and nine were set aside by the court of appeals. His convictions on counts three, six, and eight are fully supported by evidence of his participation in the conspiracy at the time these offenses were committed. Roberts was an employee of C.F.C. from August 1959 until April 1960. During that time he served as a salesman and vice-president and engaged in extensive misrepresentations of the condition and purposes of C.F.C. to numerous investor-victims as a part of his sales technique (R. 1390, 1407–1408, 1752–1753, 2228–2229).

3. Petitioners Grene and Levine formally assumed prominent roles in the conspiracy midway in the

course of its two-year history. On initial examination of this record we believed, as the court of appeals apparently did (Grene Pet. App. 10a; Levine Pet. 17), that their significant proprietary interest in 1960 supported the inference that they were associated with the unlawful venture at or about its inception. This conclusion appeared justifiable on the ground that the controlling conspirators were most unlikely either to delegate the administration of the enterprise or to assign its profits to total strangers. A closer study of the evidence introduced at the trial discloses, however, that no testimony or documentary evidence linking Levine or Grene with the early phase of the conspiracy was presented to the jury. We agree that the inference of early participation cannot, for purposes of a criminal conviction, rest merely on showing of later proprietorship. Consequently, we conclude that, under the principles previously discussed, the convictions of petitioners Grene and Levine on certain counts must be reversed.

a. The evidence shows active participation in the conspiracy by petitioner Grene beginning some time "prior to" February 1960. A witness who sold realty to both C.F.C. and Credit Realty, a related company involved in the scheme, testified that he met with Grene "prior to" February 1960 regarding the sale in question (R. 3276). On February 20, 1960, that witness again met with Grene and also with Gradsky and co-defendant Glaser in connection with the same

sale (R. 3276–3278). The property involved was then divided into two equal sections, one going to C.F.C. and the other to Credit Realty (R. 3281–3282, 3286–3287). On March 20, 1960, Grene signed as a witness various instruments transferring property between C.F.C. and its related company, Credit Realty (R. 3315–3316, 3319–3321). In April 1960, when Gradsky resigned as president of C.F.C., Grene became president and chairman of the board (R. 946, 1394, 1692–1698, 1708, 2257, 3054–3060, 3458, 3633). Thereafter, Grene served as Gradsky's alter ego, and Gradsky retained concealed control of C.F.C. through this subterfuge and Grene's cooperation in it (R. 1692–1693, 1698, 3458, 3633). Grene relinquished the title of president to Levine in July 1960.

Grene is thus clearly liable for the substantive offenses charged in counts three, four and five (March 17 and June 8, 1960). In our view, the evidence showing Grene's negotiations on behalf of the conspiracy "prior to" February 1960 and for a substantial period thereafter justifies the jury's inference that his participation began at least as early as January 21 and 25, 1960 (counts eight and six, respectively). However, with respect to the April 21, and May 8, 1959, substantive offenses (counts one and seven), we agree that there is insufficient proof in the record to support the jury's finding of guilt on those counts.

There is no evidence in the record of any participation by Grene after July 1960. We think, however, that the jury was justified in finding that there

had not been a showing of withdrawal sufficient to relieve Grene of criminal liability on counts two and nine (August 25 and September 15, 1960) under the rule of the *Hyde* case, *supra*. As noted above, the evidence is clear that Levine's assumption of the management in July 1960 did not change the nature of the operation or terminate Gradsky's involvement in it. Grene was apparently acting on Gradsky's instructions, and the jury could reasonably conclude that as long as Gradsky retained an interest Grene remained an active participant. Indeed, Grene's earlier role had not been limited to acting as president and chairman of the board; he had, as we have shown, acted for the venture in other capacities. The jury could, therefore, find under proper instructions that, notwithstanding the transfer of officership to Levine, Grene did not sever his connection with the conspiracy before the commission of the offenses charged in counts two and nine.

b. As to petitioner Levine, the evidence establishes that he managed the scheme from July 1960 until it collapsed in bankruptcy in November 1960. He was thus properly convicted on counts two and nine, which alleged substantive offenses on August 25 and September 15, 1960, respectively. There is no evidence, however, to show that Levine was involved in the conspiracy prior to his assumption of its management in July 1960. We therefore agree that his conviction of the substantive offenses committed prior to that time

(counts one, three, four, five, six, seven, and eight) cannot stand.

CONCLUSION

For the reasons stated, we submit that the petitions in No. 234 (Gradsky) and No. 125 (Roberts) should be denied. As to No. 230 (Grene) and No. 112 (Levine), we suggest that the petitions be granted and that the judgments of the court of appeals be modified by directing a remand of the cases with directions to vacate the convictions and sentences of petitioner Grene on counts one and seven and the convictions and sentences of petitioner Levine on counts one, three, four, five, six, seven and eight.

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Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 112

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY OF PETITIONER GEORGE LEVINE TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 112

GEORGE LEVINE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY OF PETITIONER GEORGE LEVINE TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant and in obedience to the Court's request of November 22, 1965, that the undersigned reply to the Supplemental Memorandum for the United States filed in the above-entitled cause by the Honorable Thurgood Marshall, Solicitor General for the United States, the petitioner George Levine, by and through his undersigned attorney, is in full accord with the interpretation of the facts as recited, and the applicable law as cited by the Solicitor General in his Supplemental Memorandum for the United States, and, therefore, states that there is now no necessity for oral argument as to this matter.

Wherefore, your petitioner being in full accord in

and agrees with the admission and conclusion of the Solicitor General, respectfully suggests that the petition of George Levine, number 112, be granted and that the judgment of the Court of Appeals be modified by directing a remand of the case with directions to vacate the convictions and sentences of petitioner George Levine on counts one, three, four, five, six, seven and eight.

Respectfully submitted,

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1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

By_____

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this ____ day of December, 1965, mailed to Thurgood Marshall, Solicitor General of the United States, Department of Justice, Washington, D. C.

_____

NICHOLAS J. CAPUANO

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IN THE

Supreme Court of the United States

October Term, 1964
No. 125

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply of Petitioner Robert B. Roberts to the Supplemental Memorandum for the United States.

This reply to the Supplemental Memorandum for the United States is filed pursuant to the Court's request of November 22, 1965, in which Petitioner Robert B. Roberts was asked to file a reply, or replies, to the further response filed by the Solicitor General. The Solicitor General's further response was pursuant to the Court's request that he respond to the following questions:

1. What evidence in the record, if any, refutes the contention that any or all of the petitioners were convicted of one or more substantive offenses committed by co-conspirators before petitioners joined the conspiracy or after they severed their connections with the fraudulent enterprise; and

2. Assuming the record sustains the contention, what legal justification exists for such liability.

DISCUSSION.

I.

The Applicable Principles of Law.

Petitioner agrees with the Solicitor General's candid admission that a person cannot be convicted of a substantive offense committed by a co-conspirator before such person joined the conspiracy or after he severed his connection with the fraudulent enterprise. This is consistent with the Government's Brief filed in *Pinkerton v. United States,* 90 L. Ed 1489, 1493, 328 U.S. 640. The rule in *Bollenbach v. United States,* 90 L. Ed. 350, 354, 326 U.S. 607, 613, is in accord.

The Solicitor General's contention that Petitioner's "convictions on counts three, six and eight are fully supported by evidence of his participation in the conspiracy at the time these offenses were committed" (Page 7, Supplemental Memorandum for the United States) standing alone is offensive to the law. *Nye and Nissen v. United States,* 93 L. Ed. 919, 336 U.S. 613, and *Pinkerton* make it clear that unless the jury is properly instructed, membership is a conspiracy alone does not make a conspirator vicariously liable for substantive offenses committed by other co-conspirators. The jury was not so instructed in the case at bar.

The judgment against Petitioner can only be upheld if the proof adduced and the basis on which it is submitted to the jury were sufficient to support the verdict. It is only when the jury has been properly instructed as to the relevant standards to be applied to the case that a basis exists for determining whether the evidence is sufficient to support the verdict. Accordingly, the relevant question is not, was the evidence suf-

ficient, but rather was it sufficient to fulfill the required standards. *Nye and Nissen v. United States,* 93 L. Ed. 919, 926, 336 U.S. 613, 620, 69 S. Ct. 766.

It is not insignificant that Petitioner's conviction on counts one, two, four, five, seven and nine were set aside by the Court of Appeals on the sole ground that there was insufficient evidence of Petitioner's intent to participate in the execution of the scheme and the acts done in furtherance thereof, to warrant the submission of the charges to the jury. In affirming that the verdict of guilty on counts three, six and eight was supported, the Court of Appeals was eloquently silent as to the sufficiency of the proof adduced and the basis on which it was submitted to the jury.

Petitioner's liability for substantive offenses committed during the time he was allegedly connected with a conspiracy can be predicated upon three legal theories, and only three;

(1) Direct participation in the commission of the substantive offense. In the case at bar the trial court instructed the jury only on this theory [R. T. 4298]. *Pinkerton v. United States,* 90 L. Ed. 1489, 1497; 328 U.S. 640, 649. As stated in *Pereira v. United States,* 98 L. Ed. 435, 447; 347 U.S. 1, 14, 74 S.C. 358, "Concededly, Brading did not participate directly in the use of the mails to transport the thirty-five thousand dollar check from El Paso to Los Angeles. He can be convicted, if at all, only as an aider and abettor."

(2) Aiding and abetting another in committing an offense. 18 U.S.C. §2(a); *Pinkerton v. United States,* 90 L. Ed. 1489, 1497, 328 U.S. 640, 649. No instruction on aiding and abetting was given

in the case at bar. However, it is clear that a verdict on this theory requires submission of those fact issues to the jury. "The 'aiding and abetting' instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on the theory." *Pereira v. United States,* 98 L. Ed. 435, 445, 347 U.S. 1, 10, 74 S.Ct. 358, *Nye and Nissen v. United States,* 93 L. Ed. 919, 925, 336 U.S. 613, 618, 69 S. Ct. 766. "We see therefore no reason to exculpate him as an aider or abettor. There was no inadequacy in the charge to the jury on that theory."

(3) Commission of a substantive offense by a co-conspirator in furtherance of the conspiracy and while the defendant was a party to the conspiracy. *Pinkerton v. United States,* 90 L. Ed. 1489, 328 U.S. 640. This instruction was not given in the case at bar. If the jury was not so instructed, the *Pinkerton* doctrine is inapplicable. As stated in *Pereira v. United States,* 98 L. Ed. 435, 445, 347 U.S. 1, "The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory." Also, *Nye and Nissen v. United States,* 93 L. Ed. 919, 925, 336 U.S. 613, 618, holds that "A verdict on that theory [Pinkerton] requires submission of those fact issues to the jury."

The only theory submitted to the jury on the question of Petitioner's guilt on the substantive offense was that of a direct participant [R. T. 4298]. Therefore,

for those offenses, guilt is individual and personal, not vicarious. To convict on the substantive counts, Petitioner actually must have used the mails as part of the execution of the scheme to defraud and in furtherance of the plan or he must have known, or reasonably have been expected to know, that the mails would be used.

Pereira v. United States, 98 L. Ed. 435, 447, 347 U.S. 1, 13-14;

Parr v. United States, 4 L. Ed. 2d 1277, 363 U.S 370, 80 S. Ct. 1171.

As to counts three, six and eight, the record is barren of any evidence that Petitioner participated in a scheme to defraud which reasonably contemplated the use of the mails, and is equally barren of any evidence that Petitioner himself used the mails in furtherance of the plan. There is no evidence that Petitioner prepared or signed any document that was mailed or mailed any document or knew of any mailing or caused any mailing of any kind. *Pereira v. United States,* 98 L. Ed. 435, 447, 347 U.S. 1; *Parr v. United States,* 4 L. Ed. 2d 1277, 1290, 363 U.S. 370; *Williams v. United States,* 278 F. 2d 535, 537 (9th Circuit).

In the case at bar the Court gave this erroneous instruction: "He may not be in at the beginning of the conspiracy and yet if he enters the conspiracy, he is responsible for all of those who are in the conspiracy and everything that has gone before and for everything that goes on afterwards." [R. T. 4311]. "Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not

responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons, and then if you find two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible." [R. T. 4312-4313]. This was tantamount to a directed verdict of guilt on all counts and Defendants took exception to the instruction [R. 4339]. Manifestly that error alone caused such harm that the conviction cannot stand. To support a verdict of guilt, the evidence must establish a direct, individual and personal link between the conspirator and the offense charged. It is not a matter of mass application. In the mass trial of several alleged conspirators, the proceedings call for use of every safeguard to individualize each defendant. In such a case, extraordinary precaution is required not only that instructions shall not mislead but that they shall fully safeguard each defendant individually, as far as possible, from loss of identity in the mass. The jury instructions often become, in such cases, a defendant's principal protection against unwarranted imputation of guilt from another's conduct. *Kotteakos v. United States,* 90 L. Ed. 1557, 328 U.S. 750.

The case against Roberts is a far cry from one reeking with guilt. Guilt by association is a lurking danger in any conspiracy prosecution. Its consequences are more serious when a substantive crime is charged. Conviction of the guiltless bystander is, of course, the great danger when the conspiracy counts and substantive counts are tried together. The jury is subject to the temptation of genralizing and the attending confusion

makes this temptation hard to resist. At the very least, the court should instruct the jury that there is a difference between the real participation contemplated by a scheme to defraud and the more remote plotting embraced by a single conspiracy. This was not done here. *Nye and Nissen v. United States,* 93 L. Ed. 919, 930, 336 U.S. 613, 69 S. Ct. 766.

The question is not, was the jury right in its judgment regardless of the affect of the error upon the verdict. Rather, it is what affect the error had or reasonably may have had upon the jury's decision. The acid point is the impact of the error on the minds of the jury. It is what the error meant to them, not singled out and standing alone, but in relation to what else happened. The inquiry here cannot be merely whether there was enough to support the result, apart from the error. The linchpin is whether the error was sufficient to influence the jury. If so, or if one is left in doubt, the conviction cannot stand. *Kotteakos v. United States,* 90 L. Ed. 1557, 1566, 328 U.S. 750.

II.

The Facts of Counts Three, Six and Eight.

Count three alleges a fraudulent sale to Mr. and Mrs. Kryway accomplished by a letter placed in the mails in Orlando, Florida, on March 17, 1960. Mr. Kryway stated that after seeing an advertisement in the paper, he went to the CFC office and spoke to Defendant Hogue who explained to him the limitations on non-resident investors, gifts for investors, and asserted CFC had assets of $3,000,000 and was engaged in the real estate and subdivision business in Florida [R. 1917-1920]. Mr. Kryway received a note for $3,000 signed by Defendant Hogue in an envelope postmarked Or-

lando and dated March 17, 1960 [Govt. Ex. 88, R. 1922]. After his talk with Mrs. Hogue, he had intended to investigate the company further but didn't get around to it [R. 1919]. Petitioner helped Mr. Kryway carry a television set from the CFC office to his automobile but there was no evidence that Petitioner participated in or even was within ear range of the conversation between Mr. Kryway and Mrs. Hogue. Thus, there was no pertinent evidence connecting Petitioner to this count [R. 1932].

Count six alleges a fraudulent sale to Mr. Stemper accomplished by a letter placed in the mail in Orlando, Florida, on January 25, 1960. Mr. Stemper testified that he wrote CFC in January of 1960 and received a reply letter by mail signed by Defendant Gibbons dated January 25, 1960 [Govt. Ex. 89, R. 1944, 1951]. He had no intention of investing in CFC after receipt of the letter [R. 1944]. In August of 1960 he went to the CFC office in Orlando and met Defendant Schiff who told him that CFC had financed the Baptist Church, had real estate, financed cars and was inspected by the State auditors [R. 1847, 1949-1950]. Mr. Stemper testified that the envelope in which he received the letter [Govt. Ex. 89] was mailed in Orlando because the letterhead had an Orlando address [R. 2081]. There was no evidence connecting Petitioner in any way to this count.

Count eight alleges a fraudulent sale to Mrs. Virack accomplished by a letter placed in the mail in Orlando, Florida, on January 21, 1960. In January, 1960, Mrs. Virack went to the CFC Orlando office and spoke to Defendant Gibbons who told her that CFC dealt in real estate, automobiles and that her money was as safe as

in a bank [R. 1068, 1070]. She then invested $5,000.00 [Govt. Exs. 43 and 44, R. 1072]. Later she received a letter through the mail signed by Gibbons, dated January 21, 1960, concerning a gift of a camera [Govt. Ex. 46, R. 1078]. She did not retain the envelope in which she received Exhibit 46 and there was no evidence that it was mailed in Orlando [R. 1085-1086, 1088]. There was no evidence connecting Petitioner in any way to this count.

The proof adduced was insufficient to support a verdict of guilty on the theory of direct participation, the only basis upon which the evidence was submitted to the jury. As stated in *Nye and Nissen v. United States,* 93 L. Ed. 919, 926, 336 U.S. 613, "The fact that a particular case might conceivably be submitted to the jury, on either theory, [Pinkerton or aiding and abetting] is irrelevant. It is sufficient that the proof adduced and the basis on which it is submitted was sufficient to support the verdict." Petitioner was not indicted as an aider and abettor nor was his case submitted to the jury on that theory or on the *Pinkerton* doctrine. There is no evidence to show that he participated directly in the commission of the substantive offenses, the base of his conviction, or anything to establish that he was the direct actor in any of the substantive offenses on which his conviction rests. The result is that Petitioner has been held guilty of substantive crimes committed by others solely on evidence aimed at conspiracy. There is nothing in the record suggesting, let alone proving, that he conferred with or advised those who directly committed the offenses or even that he was aware of the nature of those offenses. There was, therefore, no evidence at all that he aided, abetted or took part in the substantive offenses. The conviction of Petitioner on counts three,

six and eight (the substantive offenses) is wholly unsupported.

Nor can the conviction on count ten (conspiracy) stand. A conspiracy charge may not be imposed upon a substantive charge where the agreement of two persons, framing the conspiracy, is necessary for the completion of the substantive crime, since there would be no ingredient in the conspiracy which is not also present in the substantive crime. In connection with each of the substantive offenses, the indictment alleges that the Defendants collectively employed a scheme to defraud. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Inasmuch as each of the substantive offenses, by the allegations in the Indictment, became a conspiracy, the conspiracy count had no ingredient which was not present in the completed offenses. *Pinkerton v. United States,* 90 L. Ed. 1489, 1496, 328 U.S. 640, 647. Where it is impossible to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable offense, either at common law or under the federal statute. *Gebardi v. United States,* 77 L. Ed. 206, 211, 287 U.S. 112, 122, 53 S. Ct. 35.

Conclusion.

A Writ of Certiorari to the Court of Appeals to the Fifth Circuit should be issued, to the end that so much of the Court's Judgment as affirmed the Judgment of the District Court may be reviewed.

Respectfully submitted,

THOMAS F. CALL,
Attorney for Petitioner,
Robert B. Roberts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 230

ROBERT GRENE, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL MEMORANDUM FOR DEFENDANT ROBERT GRENE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 230

ROBERT GRENE, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL MEMORANDUM FOR DEFENDANT ROBERT GRENE

This supplemental memorandum is filed as an aftermath to the Court's request of October 8, 1965, in which the representatives of the United States Government were asked the following questions:

1. What evidence in the record, if any, refutes the contention that any or all of the petitioners were convicted of one or more substantive offenses committed by co-conspirators before petitioners joined the conspiracy or after they severed their connections with the fraudulent enterprise; and

2. Assuming the record sustains the contention, what legal justification exists for such liability.

On November 22, 1965, the defendant was directed to file a reply or replies to the further response filed by the Solicitor General.

IN RE PERSONS WITHDRAWING FROM A CONSPIRACY

The defendant Grene agrees with the Government's position, ". . . one cannot commit a crime by ratifying, after the fact, the criminal act of the principal offender."

The defendant Grene violently disagrees with the Government's contentions that he can be convicted under the theory of the *Hyde* case for the acts of Levine (Counts 2 and 9).

To do so, the defendant contends, will violate two principles:

1. The unquestioned rule that penal statutes are to be strictly construed against the State and in favor of the accused. *Gesell* v. *U. S.* (C.C.A.) 1 F. 2d 283.

2. The rights granted the accused by the Constitution of the United States in the Fifth Amendment that, ". . . nor shall be compelled in any criminal case to be a witness against himself . . ."

Argument in Re Point 1

Title 18, Section 371, United States Code Annotated makes a "conspiracy" a statutory crime. It does not state that any affirmative act of withdrawal is necessary. It thus does not apprise a defendant of his potential liability. It does not set up standards defining an affirmative act of withdrawal and, for this reason alone, the judge in the trial court should have directed a judgment of acquittal on Counts 2 and 9. To hold otherwise would mean that, after a sale to a disinterested third party of a corporate vehicle, such as C.F.C., a former associate would have to anticipate that a purchaser, over whom he has no control, will operate such corporate vehicle in a fraudulent manner. This puts a defendant in an impossible position.

Suppose the purchaser operates the company correctly for three years and subsequently commits a fraudulent act, can a defendant be convicted after this period of time?

The petitioner respectfully urges this Court to answer in the negative.

The petitioner has searched the record in vain and can find no evidence that Grene ever knew Levine or, much less, that he had anything to do with the company after the sale in July, 1960.

Argument in Re Point 2

The requirement that an affirmative act of withdrawal be made goes to the discussion that once again Title 371 does not set up guidelines or standards as to what will qualify as an affirmative act of withdrawal.

Does a defendant have to go to the United States Government saying that he has been engaged in a

fraudulent enterprise, but that he is no longer associated with it and thus, in effect, in order to avoid the responsibility for substantive acts occurring after a sale of the corporate vehicle, he is being disrobed of his rights granted him by the Fifth Amendment, by having to confess to previous crimes in order to avoid prosecution for subsequent ones?

Stated another way, the Government concedes that, "... one cannot commit a crime by ratifying, after the fact, the criminal act of the principal offender." We are urging the Court, in this case, that a defendant cannot be held liable for a crime unless there is definite evidence showing that he could reasonably anticipate that a third party would use his same modus operandi after the sale of a corporate vehicle to perpetuate additional frauds on other parties.

IN RE PERSONS JOINING A CONSPIRACY AFTER ITS INCEPTION

The Government has already agreed that the defendant Grene could not be convicted of substantive offenses that were committed prior to the time that he allegedly joined the conspiracy.

In this matter, the Government suggested that the petitions be granted and that the judgment of the Court of Appeals be modified by directing a remand of the cases with directions to vacate the convictions and sentences of petitioner Grene on Counts 1 and 7.

We respectfully request that this Court go further and feel that there is no question but that Counts 3, 6 and 8 be accorded similar treatment.

The Government states on page 8(a) of its memorandum that, "The evidence shows active participation in the conspiracy by petitioner Grene beginning some

time 'prior to' February 1960." The Government refers this Honorable Court to page 3276 of the record, in order to substantiate their position.

The Government, however, fails to call to the attention of the Court the cross-examination of the Government's witness Haskoe on pages 3290 and 3291, wherein the witness explains that he had known Mr. Grene by virtue of previous negotiations but, in response to the following question:

> "Q. Did those negotiations have any bearing or relationship either to the Credit Finance or the Credit Realty?"
>
> "A. No. No, not whatsoever."

Additionally, on page 3292, the same Government witness, in answer to a question, responded, "So far as I know the only people I was dealing with was Mr. Glaser and Mr. Gradsky."

Thus, there is no evidence whatsoever that should have been submitted to a jury as to Grene's participation, if any, as to Counts 3, 6 and 8.

The previously-mentioned excerpts from the Government witness Haskoe also explained Grene's acting as a witness on March 20, 1960.

What is not present in the record and which is one of the bases for all the defendant's appeals is the non-availability of the books and records of Security Guaranty. These records would clearly substantiate the position of the defendant Grene that he joined the conspiracy, if any, after April, 1960. Prior to that time, he had no relation to the defendant Norman Gradsky. His only relationship occurred when Security Guaranty purchased all of the assets of

C.F.C. in exchange for the majority of the stock of Security Guaranty.

CONCLUSION

For the reasons stated, we submit that the petition of defendant Grene should be granted, and we strongly urge that the judgment of the Court of Appeals be modified with directions to vacate the convictions and sentences of petitioner Grene on Counts 1, 2, 3, 6, 7, 8 and 9, it being understood, however, that our request stated herein is confined only to answering the Court's request and it does not waive the petitioner Grene's rights, if any, for reversal based upon the other Counts stated in his original petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 234

NORMAN GRADSKY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER, NORMAN GRADSKY

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER, NORMAN GRADSKY

In response to the Supplemental Memorandum filed for the United States by the Solicitor General, the petitioner, *Norman Gradsky*, would show that the Solicitor General concedes in his original brief that the petitioner resigned as President of *Credit Finance Corporation* in April, 1960, but, alternatively, takes the position that *Robert Grene* served thereafter as a representative of the petitioner until the sale of *Credit Finance Corporation* to *George Levine in July, 1960. (Solicitor General's Original* Brief, Page Six) In the Supplemental Brief of the Solicitor General, however, the Solicitor General in part relies upon the testimony of an officer of the *Securities Exchange Commission*, who testified about his examination of records of *Security Guaranty Company*, which were not in evidence and which during the trial were secreted in the

trunk of an automobile of a Postal Inspector and thereafter made unavailable to the petitioner and the other defendants. (R 3633 and 3634, 3782 through 3787, 3900 and 3901, 4052 through 4055)

The Solicitor General further relies upon the direct examination of a representative of the *Orlando Sentinel* that the petitioner was present at a discussion in August, 1960, concerning advertising for *Credit Finance Corporation.* (Supplemental Memorandum for the United States, Page Six) On cross-examination, however, it was adequately shown that the witness had no independent recollection of the people who were present at this one meeting, and that in fact he had taken the names of the original principals of *Credit Finance Corporation* out of his file and assumed for the purpose of his testimony that these were the people attending the conference. (R 2554 and 2555)

It is abundantly clear that the substantive offenses subsequent to April, 1960, occurred at times after which the petitioner had no longer been active with the company, and, accordingly, should fall.

By taking the foregoing position, the petitioner does not abandon the arguments set forth in the original Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated herein and in the original petition, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

SIDNEY M. DUBBIN
Attorney for Petitioner

E. DAVID ROSEN
Of Counsel

I hereby certify that a true copy of the foregoing Supplemental Memorandum for the Petitioner, *Norman Gradsky*, was airmailed to the Solicitor General of the United States, Department of Justice, Washington, D. C.

E. DAVID ROSEN

END